Supreme Court, U.S.
FILED
JAN 9 - 2007
OFFICE OF THE CLERK

No. 06-955

IN THE

Supreme Court of the United States

RONALD A. BUTLER,
Petitioner,

v.

ROBERT FLETCHER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

K. LEE MARSHALL
BRYAN CAVE LLP
One Metropolitan Sq., Ste. 3600
St. Louis, Missouri 63102
(314) 259-2000

* Counsel of Record

D. BRUCE LA PIERRE *
Appellate Clinic
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
St. Louis, Missouri 63130
(314) 935-6477

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

The Court has twice "reserved decision on the question whether something less than the Eighth Amendment's 'deliberate indifference' test may be applicable in claims by detainees asserting violation of their due process right to medical care while in custody," *City of Canton v. Harris*, 489 U.S. 378, 388 n. 8 (1989), and the circuits are now divided five to five on the directly related question:

> whether deliberate indifference is the degree of culpability that must be shown to establish that pretrial detention conditions amount to punishment in violation of the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Petitioner Ronald A. Butler is a former pretrial detainee at the Ramsey County Adult Detention Center, and Respondent Sheriff Robert Fletcher is the official who is responsible for the operation of that facility.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
I. THE CIRCUITS ARE DIVIDED ON THE QUESTION WHETHER THE CONSTITUTIONALITY OF PRETRIAL DETENTION CONDITIONS IS ADDRESSED UNDER *BELL*'S DUE PROCESS STANDARD OR UNDER THE EIGHTH AMENDMENT DELIBERATE INDIFFERENCE STANDARD	8
II. THE CIRCUIT SPLIT PRESENTS AN IMPORTANT ISSUE WHETHER THE EIGHTH AMENDMENT STANDARD FORMULATED TO PROTECT CONVICTED PRISONERS FROM "CRUEL AND UNUSUAL PUNISHMENTS" SHOULD BE APPLIED TO PREVENT "PUNISHMENT" OF PRETRIAL DETAINEES	19
CONCLUSION	25
Appendix A	1a
Appendix B	13a
Appendix C	14a
Appendix D	15a

TABLE OF AUTHORITIES

CASES Page

Aston v. Cunningham, No. 99-4156, 2000 WL 796086 (10th Cir. June 21, 2000) 13
Bainum v. Sedgwick County Comm'rs, 27 F. App'x 965 (10th Cir. 2001) 13
Bell v. Wolfish, 441 U.S. 520 (1979) ..... *passim*
Benjamin v. Fraser, 343 F.3d 35 (2d Cir. 2003) ... 17
Block v. Rutherford, 468 U.S. 576 (1984) ..... *passim*
Board v. Farnham, 394 F.3d 469 (7th Cir. 2005) 9
Bd. of County Comm'rs v. Brown, 520 U.S. 397 (1997) 4
Brogsdale v. Barry, 926 F.2d 1184 (D.C. Cir. 1991) 18
Burrell v. Hampshire County, 307 F.3d 1 (1st Cir. 2002) 12
Butler v. Fletcher, 465 F.3d 340 (8th Cir. 2006)... 1
City of Canton v. Harris, 489 U.S. 378 (1989) ..... i, 5
City of Revere v. Mass. Gen. Hosp., 463 U.S. 239 (1983) 5
Collins v. Ainsworth, 382 F.3d 529 (5th Cir. 2004) 16
County of Sacramento v. Lewis, 523 U.S. 833 (1998) 6
Covino v. Vermont Dep't of Corr., 933 F.2d 128 (2d Cir. 1991) 17
Craig v. Eberly, 164 F.3d 490 (10th Cir. 1998) 13
Daniel v. U.S. Marshal Serv., 188 F. App'x 954 (11th Cir. 2006) 14
Daniels v. Woodside, 396 F.3d 730 (6th Cir. 2005) 13
Davidson v. Cannon, 474 U.S. 344 (1986) 20
Demery v. Arpaio, 378 F.3d 1020 (9th Cir. 2004) 8, 9

TABLE OF AUTHORITIES—Continued

	Page
DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989)	9
Dittmeyer v. Whetsel, 91 F. App'x 111 (10th Cir. 2004)	13
Esmont v. City of New York, 371 F. Supp. 2d 202 (E.D.N.Y. 2005)	17
Estelle v. Gamble, 429 U.S. 97 (1976)	11
Farmer v. Brennan, 511 U.S. 825 (1994)	6, 10, 11, 23
Ford v. Mercer County Corr. Ctr., 171 F. App'x 416 (3d Cir. 2006)	15
Frost v. Agnos, 152 F.3d 1124 (9th Cir. 1998)	9
Graham v. Connor, 490 U.S. 396 (1989)	21
Hare v. City of Corinth, 74 F.3d 633 (5th Cir. 1996)	15, 16
Hart v. Sheahan, 396 F.3d 887 (7th Cir. 2005)	9
Hause v. Vaught, 993 F.2d 1178 (4th Cir. 1993)	8
Helling v. McKinney, 509 U.S. 25 (1993)	11
Hubbard v. Taylor, 399 F.3d 150 (3d Cir. 2005)	*passim*
Hydrick v. Hunter, 466 F.3d 676 (9th Cir. 2006)	7
Ingraham v. Wright, 430 U.S. 651 (1977)	10
Jacobs v. W. Feliciana Sheriff's Dep't, 228 F.3d 388 (5th Cir. 2000)	16
Lareau v. Manson, 651 F.2d 96 (2d Cir. 1981)	16
Lopez v. LeMaster, 172 F.3d 756 (10th Cir. 1999)	13
Lyons v. Powell, 838 F.2d 28 (1st Cir. 1988)	12
Magluta v. Samples, 375 F.3d 1269 (11th Cir. 2004)	14
Marsh v. Butler County, 268 F.3d 1014 (11th Cir. 2001)	14
Martinez v. Claussen, 43 F. App'x 262 (10th Cir. 2002)	13
Mauro v. Arpaio, 188 F.3d 1054 (9th Cir. 1999)	8

TABLE OF AUTHORITIES—Continued

	Page
McClendon v. City of Albuquerque, 79 F.3d 1014 (10th Cir. 1996)	13
McGinnis v. Royster, 410 U.S. 263 (1973)	20
McMillian v. Cortland County Corr. Facility, No. 99-0057, 1999 WL 753336 (2d Cir. Sept. 14, 1999)	16
Nerren v. Livingston Police Dep't, 86 F.3d 469 (5th Cir. 1996)	15
Pietrafeso v. Lawrence County, 452 F.3d 978 (8th Cir. 2006)	4
Riggins v. Nevada, 504 U.S. 127 (1992)	21
Robles v. Prince George's County, 302 F.3d 262 (4th Cir. 2000)	18
Rush v. Astacio, No. 97-2661, 1998 WL 480751 (2d Cir. July 31, 1998)	17
Sandin v. Connor, 515 U.S. 472 (1995)	19, 20
Scott v. Moore, 114 F.3d 51 (5th Cir. 1997)	16
Spencer v. Bouchard, 449 F.3d 721 (6th Cir. 2006)	12
Slade v. Hampton Rds. Reg'l Jail, 407 F.3d 243 (4th Cir. 2005)	17
Surprenant v. Rivas, 424 F.3d 5 (1st Cir. 2005)	12
Tesch v. County of Green Lake, 157 F.3d 465 (7th Cir. 1998)	9
Thompson v. County of Medina, 29 F.3d 238 (6th Cir. 1994)	13
Turner v. Safley, 482 U.S. 78 (1987)	8
Ullrich v. Canyon County Det. Ctr., 84 F. App'x 752 (9th Cir. 2003)	9
United States v. Salerno, 481 U.S. 739 (1987)	5, 20, 22
Valdez v. Rosenbaum, 302 F.3d 1039 (9th Cir. 2002)	9

TABLE OF AUTHORITIES—Continued

	Page
Wall v. Daup[illegible] County, 167 F. App'x 309 (3d Cir. 2006)	15
Wilson v. Seiter, 501 U.S. 294 (1991)	11, 23
Youngberg v. Romeo, 457 U.S. 307 (1982)	21
CONSTITUTIONAL AND STATUTORY PROVISIONS	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	3
42 U.S.C. § 1983	2
U.S. Const. amend. VIII	2
U.S. Const. amend. XIV, § 1	2

IN THE

Supreme Court of the United States

No. ___

RONALD A. BUTLER,

Petitioner,

v.

ROBERT FLETCHER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Ronald A. Butler respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. 15a) is reported at 465 F.3d 340 (8th Cir. 2006). The magistrate's report and recommendation (App. 1a) and the district court's order adopting it (App. 13a) are not reported.

JURISDICTION

The court of appeals entered its judgment on October 13, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of Fourteenth Amendment:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1. It also involves the Eighth Amendment, as applied to the States through the Fourteenth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

STATEMENT OF THE CASE

This case arises from Ronald A. Butler's allegation that he contracted tuberculosis at a pretrial detention facility, and it presents the question whether a constitutional challenge to pretrial detention conditions should be determined under the due process standard of *Bell v. Wolfish*, 441 U.S. 520 (1979), or under the deliberate indifference standard of the Eighth Amendment.

1. Ronald A. Butler was a pretrial detainee at the Ramsey County Adult Detention Center (ADC) in 2001. App. 15a. After Butler was convicted, he "was transferred to a prison, where he tested positive for tuberculosis (TB)." App. 15a. Butler filed a damages action against Sheriff Robert Fletcher under 42 U.S.C. § 1983 and alleged "that Fletcher violated [his] Substantive Due Process rights by failing to adopt and implement adequate safeguards protecting ADC inmates from TB infection." App. 15a. Butler alleged "that he spent most of his time at ADC in two-person cells and in larger holding cells, where as many as twenty-six short-term detainees were held under deplorable sanitary conditions" and that "Fletcher's policy of placing short-term

detainees in multi-person cells without an initial TB screening inadequately protect[ed] ADC detainees from the serious health risk of TB." App. 16a.

2. The district court had jurisdiction to hear Butler's case under 28 U.S.C. § 1331. The Magistrate Judge issued a report and recommendation that Sheriff Fletcher's motion for summary judgment be granted. App. 11a. The Magistrate Judge recognized that Butler's claims "are most appropriately analyzed under the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment" because he was a pretrial detainee at the ADC, but he concluded that "[t]he general standard applied by the Eighth Circuit is the 'deliberate indifference' standard of the Eighth Amendment." App. 7a, 8a. Applying this Eighth Amendment standard, the Magistrate Judge found that "[t]here is simply no material question of fact which could allow a reasonable fact-finder to conclude that [Fletcher] acted with deliberate indifference." App. 11a. The district court adopted the report and recommendation and granted summary judgment. App. 13a.

3. On appeal, Butler argued "that the district court erred in applying the Eighth Amendment standard of deliberate indifference because, as a pretrial detainee, [he] was protected by the Fourteenth Amendment's guarantee of substantive due process." App. 20a. Butler relied principally on *Bell v. Wolfish*, 441 U.S. 520 (1979), for the proposition that "[i]n evaluating the constitutionality of conditions or restrictions of pretrial detention . . . the proper inquiry is whether those conditions amount to punishment of the detainee." App. 20a (internal quotation marks omitted). Butler also relied on the Third Circuit's recent decision in *Hubbard v. Taylor*, 399 F.3d 150 (3d Cir. 2005), which held that pretrial detention conditions cases are governed by the standards set by the Court in *Bell*.

4. The Eighth Circuit affirmed. App. 16a. Because Butler had sued Sheriff Fletcher in his official capacity, the

suit was "in essence . . . against Ramsey County," and Butler had to establish both that Sheriff Fletcher had violated his constitutional rights and that the County was responsible for this violation. App. 16a (citing *Pietrafeso v. Lawrence County*, 452 F.3d 978, 982 (8th Cir. 2006) (citing *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 407 (1997))). With respect to the Sheriff's liability, the court of appeals rejected the *Bell* standard for two reasons. First, the court reasoned that "the same standard of care is appropriate" for both "[p]retrial detainees and convicted inmates" because they "have the same right to . . . basic human needs." App. 21a-22a. Second, the court believed that the second part of the *Bell* standard—whether a condition is reasonably related to a legitimate government purpose—was "a negligence standard," which it found inconsistent with this Court's subsequent holdings that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." App. 22a (internal quotation marks omitted). For these reasons, the court of appeals held "that deliberate indifference is the appropriate standard of culpability for all claims that prison officials failed to provide pretrial detainees with adequate food, clothing, shelter, medical care, and reasonable safety." App. 22a.

REASONS FOR GRANTING THE WRIT

The circuits are evenly divided five to five on the question of the constitutional standard that should apply to pretrial detainees' challenges to conditions of confinement. The court below held that "deliberate indifference is the appropriate standard of culpability" for all claims by pretrial detainees that officials failed to provide them with "adequate food, clothing, shelter, medical care, and reasonable safety." App. 22a. This decision of the Eighth Circuit, and the decisions of four other circuits applying the Eighth Amendment deliberate indifference standard to conditions of pretrial detention, is in direct conflict with decisions of five circuits,

which have held that pretrial detainees' challenges to conditions of confinement must be addressed under the due process standard of *Bell v. Wolfish*, 441 U.S. 520 (1979).

The Court drew a sharp distinction in *Bell* between rights of federal pretrial detainees under the Due Process Clause of the Fifth Amendment to be free from "punishment" and the rights of persons convicted of crime to be free from "cruel and unusual punishment" under the Eighth Amendment. 441 U.S. at 535-37 & nn. 16-18. *Bell* established a test to determine whether restrictions and conditions accompanying pretrial detention constitute unconstitutional "punishment," and the Court has applied this test to analyze constitutional challenges to the general practices, rules, and restrictions of pretrial confinement. *See United States v. Salerno*, 481 U.S. 739, 746-47 (1987) (holding Bail Reform Act's authorization of pretrial detention constitutional); *Block v. Rutherford*, 468 U.S. 576, 588-91 (1984) (upholding policy of no contact visits and random shakedown searches of cells in absence of detainees). The courts of appeals of five circuits apply this test, or a directly derivative test, to determine the constitutionality of pretrial detention conditions.

Although *Bell* establishes a clear due process test to determine whether conditions of confinement of pretrial detainees are constitutional, the Court's statements in a few subsequent decisions have created confusion about the nature of the States' obligation to pretrial detainees. In the context of medical care for pretrial detainees, as opposed to the general conditions of detention at issue in *Bell*, the Court has twice "reserved decision on the question whether something less than the Eighth Amendment's 'deliberate indifference' test may be applicable." *City of Canton v. Harris*, 489 U.S. 378, 388 n. 8 (1989); *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243-45 (1983). The Court has also noted that the due process rights of a pretrial detainee are "at least as great as the Eighth Amendment protections available to a convicted

prisoner" and that deliberate indifference, which suffices for Eighth Amendment liability, "must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial." *County of Sacramento v. Lewis*, 523 U.S. 833, 849-50 (1998) (internal quotation marks and citation omitted). In light of these statements, the Eighth Circuit and four other circuits have adopted the Eighth Amendment deliberate indifference standard to measure the constitutionality of pretrial detention conditions.

This circuit split—created by inferences drawn from some of the Court's post-*Bell* decisions—is one that can be resolved only by this Court. The split is mature. In challenges to pretrial detention conditions, the courts of ten circuits have adopted either *Bell*'s due process standard or the Eighth Amendment deliberate indifference standard, and they have divided five to five. The choice between these two constitutional standards was examined thoroughly in the decision below, which adopted the Eighth Amendment deliberate indifference standard, and in decisions of the Third and Fifth Circuits, which both applied *Bell*. There is nothing to be gained by letting the issue percolate further in the lower courts.

The question of constitutional standards that divides the courts of appeals is important. The two standards are fundamentally different. Under *Bell*, courts inquire whether there is an intent to punish, and in the absence of an express intent, they make an essentially objective determination whether a condition or restriction of pretrial detention is reasonably related to a legitimate, nonpunitive objective or is excessive in relation to such an end. *Bell*, 441 U.S. at 538-39. Under the Eighth Amendment, a prisoner must establish as an objective matter, that prison conditions rise to the level of a "serious" deprivation and that as a subjective matter the deprivation is caused by a prison official's deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

Both standards incorporate deference to the judgment of institutional officials, but they have significantly different implications for the administration of pretrial detention facilities. The two standards also have significantly different implications for pretrial detainees—"persons who have been charged with a crime but who have not yet been tried on the charge." *Bell*, 441 U.S. at 523. The application of Eighth Amendment standards to pretrial detainees presents the question whether—as the Court has previously recognized—the constitutional rights of pretrial detainees, and of others in government custody who have not been convicted of any crime, are significantly different than the rights of convicted prisoners. To the extent that pretrial detainees and convicted prisoners have common rights to basic human necessities, the circuit split presents the question whether the threshold for establishing a constitutional violation should be lower for pretrial detainees than for convicted prisoners. These questions—which also arise in challenges to the conditions of confinement of persons who are civilly committed to government custody—will continue to divide the courts of appeals unless the Court reviews the decision below. *See, e.g., Hydrick v. Hunter*, 466 F.3d 676, 695-96 (9th Cir. 2006) ("[S]tandard applicable to [civilly committed sexually violent predators] under the Fourteenth Amendment are [sic] *at least* coextensive with that applicable to prisoners under the Eighth Amendment.").

I. THE CIRCUITS ARE DIVIDED ON THE QUESTION WHETHER THE CONSTITUTIONALITY OF PRETRIAL DETENTION CONDITIONS IS ADDRESSED UNDER *BELL*'S DUE PROCESS STANDARD OR UNDER THE EIGHTH AMENDMENT DELIBERATE INDIFFERENCE STANDARD

In the twenty-seven years after *Bell* was decided, some courts of appeals have concluded that the Court's statements in a few post-*Bell* decisions require application of the Eighth Amendment deliberate indifference standard to pretrial detainees' challenges to conditions of confinement, while others have adhered to *Bell* or to standards culled from *Bell* to determine whether conditions of pretrial confinement constitute "punishment."[1] The Third, Fifth, and Eighth Circuits have addressed expressly the choice between these two different constitutional standards, and the decision below of the Eighth Circuit adopting the Eighth Amendment deliberate indifference standard squarely conflicts with the decisions of the Third and Fifth Circuits applying *Bell*'s due process standard to challenges to conditions of pretrial detention. The

---

[1] To the extent that challenges to pretrial detention conditions are viewed as challenges to institutional regulations, this circuit split sometimes appears not as a choice between *Bell*'s due process standard and the Eighth Amendment deliberate indifference standard, but instead as a choice between *Bell*'s due process standard and the Eighth Amendment standard applied to prison regulations in *Turner v. Safley*, 482 U.S. 78 (1987). *Compare Hause v. Vaught*, 993 F.2d 1079, 1081-84 (4th Cir. 1993) (*Turner*'s Eighth Amendment standard applied to restrictions on receipt of mail), *cert. denied*, 510 U.S. 1049 (1994), *with Demery v. Arpaio*, 378 F.3d 1020, 1028-29 (9th Cir. 2004) (*Bell*'s due process standard, not *Turner*'s Eighth Amendment standard, applies to use of "webcams" to stream live images of pretrial detainees on the Internet), *cert. denied*, 125 S. Ct. 2961 (2005), *and Mauro v. Arpaio*, 188 F.3d 1054, 1058 (9th Cir. 1999) (en banc) (policy prohibiting possession of sexually explicit materials by pretrial detainees evaluated under *Turner*).

circuits are now evenly divided on the question. Although there are some outliers, the prevailing standard in five circuits is *Bell*, and the prevailing standard in five other circuits is deliberate indifference.[2]

A. *Bell* held that federal pretrial detainees' constitutional rights are governed by Fifth Amendment due process standards and not by the Eighth Amendment's prohibition of cruel and unusual punishment.[3] 441 U.S. 520, 535-37 & nn. 16-18 (1979). This distinction between due process rights and Eighth Amendment rights turns on a State's authority to punish prisoners, but not pretrial detainees. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199 n.

---

[2] In the two remaining circuits—the Seventh and the Ninth—there is no prevailing standard. In the Seventh Circuit, one recent decision applied the Eighth Amendment deliberate indifference standard to pretrial detention conditions, but another contemporaneous decision found that this Eighth Amendment standard and the *Bell* due process standard "merge" and examined pretrial detention conditions without any inquiry into the state of the mind of the jail officials. *Compare Board v. Farnham*, 394 F.3d 469, 477-78, 485-86 (7th Cir. 2005), *with Hart v. Sheahan*, 396 F.3d 887, 891-94 (7th Cir. 2005); *see also Tesch v. County of Green Lake*, 157 F.3d 465, 472-75 (7th Cir. 1998) (applying the Eighth Amendment deliberate indifference standard to pretrial conditions of confinement and attempting to carve out some room for application of the *Bell* due process test). Panels are also divided in the Ninth Circuit. *Compare Demery v. Arpaio*, 378 F.3d 1020, 1028 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2961 (2005), *and Valdez v. Rosenbaum*, 302 F.3d 1039, 1045-46 (9th Cir. 2002), *cert. denied*, 538 U.S. 1047 (2003) (both applying *Bell*), *with Ullrich v. Canyon County Det. Ctr.*, 84 F. App'x 752, 753-55 (9th Cir. 2003), *and Frost v. Agnos*, 152 F.3d 1124, 1128-30 (9th Cir. 1998) (both applying deliberate indifference standard).

[3] Subsequently, the courts of appeals have uniformly held that the rights of pretrial detainees in state custody are governed by the Due Process Clause of the Fourteenth Amendment. *See, e.g., Hubbard v. Taylor*, 399 F.3d 150, 158 n. 13 (3d Cir. 2005). It is the measure of the Fourteenth Amendment due process right—*Bell*'s due process standard or the Eighth Amendment deliberate indifference standard—that has divided the courts of appeals.

6 (1989); *see also Ingraham v. Wright*, 430 U.S. 651, 671 n. 40 (1977) ("[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law."). Prisoners, who are subject to punishment because they have been convicted of a crime, have an Eighth Amendment right not to be subject to "cruel and unusual punishments." *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Pretrial detainees, however, cannot be punished at all because they have not been convicted of a crime, and their rights are protected by the Due Process Clause. *Bell*, 441 U.S. at 535.

Under *Bell*, to determine "whether particular restrictions and conditions accompanying pretrial detention amount to punishment," courts first decide "whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 538. In the absence of an express intent to punish, courts then must determine whether a particular restriction or condition of pretrial detention is "reasonably related to a legitimate governmental objective" or whether the condition "appears excessive" in relation to the objective. *Id.* at 538-39 (internal quotation marks omitted). If pretrial conditions or restrictions are "not reasonably related to a legitimate goal" or are excessive, "a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Id.* at 539. As the Court subsequently noted, *Bell* "carefully outlined the principles to be applied in evaluating the constitutionality of conditions of pretrial confinement." *Block v. Rutherford*, 468 U.S. 576, 584 (1984).

Under the Eighth Amendment, to determine whether prison conditions constitute "cruel and unusual punishment," the Court has established a two-part "deliberate indifference" standard. This deliberate indifference standard has an objec-

tive component which addresses the seriousness of the deprivation and a subjective component which addresses the state of a prison official's mind. As the Court has explained, prison conditions violate the Eighth Amendment if, as an objective matter, they rise to the level of a "serious" deprivation and if, as a subjective matter, the deprivation is caused by a prison official's deliberate indifference. *Wilson v. Seiter*, 501 U.S. 294, 296-302 (1991). Under the subjective component, a prisoner must show that the official had a culpable state of mind—that the official was deliberately indifferent to the prisoner's health or safety. As the Court explained in *Farmer*, "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." 511 U.S. at 847; *see also Helling v. McKinney*, 509 U.S. 25 (1993) (applying a deliberate indifference test to a prisoner's claims about exposure to second hand smoke); *Estelle v. Gamble*, 429 U.S. 97 (1976) (applying a deliberate indifference test to a prisoner's medical treatment claims).

B. Relying on some of the Court's post-*Bell* statements and decisions, the Court of Appeals for the Eighth Circuit expressly rejected any inquiry under *Bell* whether pretrial detention conditions were "reasonably related to a legitimate governmental objective" or were "excessive." App. 21a-22a. The court below ignored the then very recent decision of the Third Circuit holding that this inquiry under *Bell* applied to challenges to pretrial detention conditions, *Hubbard v. Taylor*, 399 F.3d 150 (3rd Cir. 2005), and it determined that the Court's post-*Bell* decisions "while not resolving the issue, are consistent with" the application of the Eighth Amendment deliberate indifference standard to pretrial detainees' challenges to conditions of confinement. App. 20a.

It then applied the Eighth Amendment deliberate indifference standard set in *Farmer*. App. 22a-23a. Butler's evidence that he was exposed to fellow pretrial detainees "with active TB cases in a manner that created an unreasonable risk of serious harm to his health" satisfied *Farmer's* objective component. App. 22a. Butler, however, could not satisfy the subjective deliberate indifference component because he lacked proof that the Sheriff "actually knew of and *recklessly disregarded*" a substantial risk of serious harm. App. 23a (internal quotation marks omitted).

With this decision, the Eighth Circuit joins the courts of four other circuits that apply the Eighth Amendment deliberate indifference standard to constitutional challenges to conditions of pretrial detention. Although the courts of appeals for the First, Sixth, Tenth, and Eleventh Circuits have not expressly addressed the choice between *Bell*'s due process standard and the Eighth Amendment deliberate indifference standard, deliberate indifference is the prevailing standard in the courts of these circuits:

> **First Circuit**: The most recent decision of the Court of Appeals for the First Circuit applies the Eighth Amendment deliberate indifference standard set in *Farmer* to pretrial detention conditions. *Surprenant v. Rivas*, 424 F.3d 5, 18-21 (1st Cir. 2005); *see also Burrell v. Hampshire County*, 307 F.3d 1, 7 (1st Cir. 2002) (applying the Eighth Amendment deliberate indifference standard to a pretrial detainee's claim that officials failed to protect him from assault by a fellow detainee). The court of appeals did not address a much earlier decision that applied *Bell's* Fifth Amendment due process standard to conditions of confinement of a federal pretrial detainee. *See Lyons v. Powell*, 838 F.2d 28, 29-30 (1st Cir. 1988).
>
> **Sixth Circuit**: The Court of Appeals for the Sixth Circuit applies the Eighth Amendment deliberate indifference standard to pretrial detention conditions. *Spencer v. Bouchard*, 449 F.3d 721, 727-30 (6th Cir. 2006);

Thompson v. County of Medina, 29 F.3d 238, 242 (6th Cir. 1994); *see also Daniels v. Woodside*, 396 F.3d 730, 735-36 (6th Cir. 2005) (holding that "[t]hrough the Due Process Clause of the Fourteenth Amendment, pretrial detainees are entitled to the same Eighth Amendment rights as are other inmates," and finding, without reliance on *Bell*, that conditions of detention were not punitive and had a legitimate purpose of preventing the detainee's suicide).

Tenth Circuit: The leading 1998 and 1999 decisions of the Court of Appeals for the Tenth Circuit applied the Eighth Amendment deliberate indifference standard set in *Farmer* to conditions of pretrial detention. *Lopez v. LeMaster*, 172 F.3d 756, 759 n. 2, 759-61 (10th Cir. 1999); *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998); *see also McClendon v. City of Albuquerque,* 79 F.3d 1014, 1022 (10th Cir. 1996) ("Although pretrial detainees are protected under the Due Process Clause of the Fourteenth Amendment, the Eighth Amendment standards applicable to convicted persons provide the benchmark."). All more recent decisions are not officially reported, and these decisions, with one exception, apply the Eighth Amendment deliberate indifference standard to pretrial detention conditions. *Compare Dittmeyer v. Whetsel*, 91 F. App'x 111, 118-19 (10th Cir. 2004); *Bainum v. Sedgwick County Comm'rs*, 27 F. App'x 965, 968-69 (10th Cir. 2001); *and Aston v. Cunningham*, No. 99-4156, 2000 WL 796086 (10th Cir. June 21, 2000) (all applying the deliberate indifference standard); *with Martinez v. Claussen*, 43 F. App'x 262, 262-63 (10th Cir. 2002) (upholding magistrate's determination under *Bell* of constitutionality of pretrial detention conditions).

Eleventh Circuit: Absent any argument about differences between the Fourteenth Amendment due process standard applicable to pretrial detainees and the Eighth Amendment deliberate indifference standard applicable to persons convicted of a crime, the Court of Appeals for

the Eleventh Circuit applies the Eighth Amendment deliberate indifference test to pretrial detention conditions. *Marsh v. Butler County*, 268 F.3d 1014, 1024 n. 5, 1028-34 (11th Cir. 2001) (en banc). Although one panel subsequently has applied *Bell* in a *Bivens* action to a claim by a federal pretrial detainee that harsh treatment by federal officials was solely for the purpose of punishment, this case did not raise any question about pretrial detention conditions. *Magluta v. Samples*, 375 F.3d 1269, 1272, 1275 (11th Cir. 2004). Apart from this case raising a claim of intentional punishment of a pretrial detainee by federal officials, the court of appeals otherwise follows *Marsh* and applies the Eighth Amendment deliberate indifference standard as the measure of federal pretrial detainees' Fifth Amendment due process rights. *See Daniel v. U.S. Marshal Serv.*, 188 F. App'x 954, 961-62 (11th Cir. 2006) (holding that Fifth Amendment Due Process Clause applies in *Bivens* action but the standard is the same under both the Eighth and Fifth Amendments).

C. The Eighth Circuit's decision to adopt the Eighth Amendment deliberate indifference standard squarely conflicts with the decisions of the Third and Fifth Circuits to apply *Bell*'s due process standard to pretrial detention conditions.

The Court of Appeals for the Third Circuit held in *Hubbard* that pretrial detainees' claims about conditions of confinement are addressed by the standard set in *Bell*. 399 F.3d at 166-67. The court canvassed its prior decisions and recognized that it had permitted lower courts to measure pretrial detainees' claims by Eighth Amendment standards. *Id.* at 164-66. It then expressly rejected the district court's determination that "pretrial detainees are afforded essentially the same protection as convicted prisoners and that an Eighth Amendment analysis is appropriate for determining if the conditions of confinement rise to the level of a constitutional violation." *Id.* at 166 (internal quotation marks omitted). It

held instead that pretrial detainees "are not within the ambit of the Eighth Amendment['s] prohibition against cruel and unusual punishment . . . because they have not as yet been convicted of anything" and that "[a]s the Supreme Court explained in *Bell*, pre-trial detainees cannot be punished at all under the Due Process Clause." *Id.* (internal quotation marks and citation omitted).

The court remanded the case for consideration under a two-part test that it had previously "distilled" from *Bell*:

> [W]e must ask, first, whether any legitimate purposes are served by these conditions, and second, whether these conditions are rationally related to these purposes. In assessing whether the conditions are reasonably related to the assigned purposes, we must further inquire as to whether these conditions "cause [inmates] to endure [such] genuine privations and hardship over an extended period of time, that the adverse conditions become excessive in relation to the purposes assigned to them."

Id. at 159-60 (alterations in original) (citation omitted), 168. The Third Circuit continues to follow *Hubbard* and to apply its *Bell* due process standard to pretrial detention conditions. *See Ford v. Mercer County Corr. Ctr.*, 171 F. App'x 416, 418-19 (3d Cir. 2006); *Wall v. Dauphin County*, 167 F. App'x 309, 311-12 (3d Cir. 2006).

The Fifth Circuit has reached the same result as the Third Circuit. As part of a comprehensive clarification of its case law governing pretrial detainees, the en banc Fifth Circuit distinguished pretrial detainees' "attacks [on] general conditions, practices, rules, or restrictions of pretrial confinement" and claims "based on a jail official's episodic acts or omissions." *Hare v. City of Corinth*, 74 F.3d 633, 643 (5th Cir. 1996) (en banc); *see also Nerren v. Livingston Police Dep't*, 86 F.3d 469, 473 n. 25 (5th Cir. 1996) (describing *Hare* as a "single opinion that clearly and concisely articulates and unifies our court's case law in this area"). The

Fifth Circuit held that *Bell* applies to claims that conditions of pretrial detention are unconstitutional, *Hare*, 74 F.3d at 643, 644-45, and that the *Farmer* deliberate indifference standard is the "measure of culpability for episodic acts or omissions." *Id.* at 643, 645-50; *see also Scott v. Moore*, 114 F.3d 51, 53 (5th Cir. 1997) (en banc) (distinguishing claims about conditions of confinement from claims based on episodic acts or omissions). After this 1996 en banc decision, the Fifth Circuit has consistently applied the *Bell* due process test to "conditions of confinement" claims and the deliberate indifference standard to "episodic acts or omissions." *See, e.g.*, *Collins v. Ainsworth*, 382 F.3d 529, 540 (5th Cir. 2004) (applying *Bell* to pretrial detainee's overcrowding claim); *Jacobs v. W. Feliciana Sheriff's Dep't*, 228 F.3d 388, 393 & n. 3 (5th Cir. 2000) (applying the deliberate indifference standard to claim that officials failed to prevent pretrial detainee's suicide).

Although the Second, Fourth, and District of Columbia Circuits have not comprehensively discussed the choice between the *Bell* due process standard and the Eighth Amendment deliberate indifference standard in the same fashion as the Third and Fifth Circuits, courts in these three circuits also apply *Bell* to pretrial detention conditions:

> **Second Circuit:** The Court of Appeals for the Second Circuit recognized beginning in 1981 that *Bell* "established the framework for evaluating complaints of unconstitutional prison conditions by pretrial detainees." *Lareau v. Manson*, 651 F.2d 96, 102 (2d Cir. 1981). In this initial decision, the court determined that overcrowding of pretrial detainees was "punishment" prohibited by the Due Process Clause because it was "not reasonably related to a legitimate governmental objective." *Id.* at 102, 103. Subsequently, other panels have continued to apply *Bell* to determine whether the conditions of pretrial detention are reasonably or rationally related to legitimate governmental objectives. *Mc-*

Millian v. Cortland County Corr. Facility, No. 99-0057, 1999 WL 753336, at *1 (2d Cir. Sept. 14, 1999); *Rush v. Astacio*, No. 97-2661, 1998 WL 480751, at *1 (2d Cir. July 31, 1998); *Covino v. Vermont Dep't of Corr.*, 933 F.2d 128, 130 (2d Cir. 1991).

One panel has recently addressed the intersection of the Eighth Amendment deliberate indifference test and the *Bell* due process test, and it adopted a modified deliberate indifference standard that is the functional equivalent of the *Bell* standard. *Benjamin v. Fraser*, 343 F.3d 35 (2d Cir. 2003); *see also Esmont v. City of New York*, 371 F. Supp. 2d 202, 217 (E.D.N.Y. 2005) (following *Fraser* and applying *Bell* to an arrestee's claims about conditions of confinement). In determining whether jail conditions violated the Constitution, the court expressly rejected the contention that a pretrial detainee must establish deliberate indifference under the Eighth Amendment standard of *Farmer*. *Fraser*, 343 F.3d at 51. Although the court held that "a pretrial inmate mounting a constitutional challenge to environmental conditions must show deliberate indifference," it also held that deliberate indifference "may generally be presumed from an absence of reasonable care." *Id.* at 50; *see also id.* at 51 ("[I]n a challenge by pretrial detainees asserting a *protracted* failure to provide safe prison conditions, the deliberate indifference standard does not require the detainees to show anything more than actual or imminent substantial harm.").

Fourth Circuit: The Court of Appeals for the Fourth Circuit applies a "standard . . . culled from the one announced by the Court in *Bell*" to pretrial detention conditions. *Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243, 251 n. 7 (4th Cir. 2005). A pretrial detainee "first must show the imposition of a particular 'disability'" and then "[t]o establish that a particular condition or restriction of his confinement is constitutionally impermissible 'punishment,' the pretrial detainee must show either that it was (1) imposed with an expressed intent to

punish or (2) not reasonably related to a legitimate nonpunitive governmental objective, in which case an intent to punish may be inferred." *Id.* at 251 (internal citations omitted); *see Robles v. Prince George's County,* 302 F.3d 262, 269-70 (4th Cir. 2000) (arrestee was a pretrial detainee and conditions of restraint are evaluated under *Bell*'s due process standard), *reh'g and reh'g en banc denied*, 308 F.3d 437 (4th Cir. 2002), *cert. denied*, 538 U.S. 945 (2003).

District of Columbia Circuit: The Court of Appeals for the District of Columbia Circuit has had apparently little occasion to consider the constitutional claims of pretrial detainees, but it has held that pretrial detention conditions are evaluated under *Bell*'s due process standards. *Brogsdale v. Barry*, 926 F.2d 1184, 1187 & n. 4 (D.C. Cir. 1991). This court recognized that the "foundation of the constitutional right[s]" of prison inmates and pretrial detainees is different: "*pretrial detainees* must rely upon the Fifth Amendment's guarantee of due process, whereas the *convicted plaintiffs* must ground their claims upon the Eighth Amendment's ban on cruel and unusual punishment." *Id.* at 1187. Although overcrowding and other "conditions constituting the constitutional violation may be essentially the same . . . the threshold for establishing a constitutional violation is clearly lower for the pretrial detainees." *Id.* at 1187 n. 4. For pretrial detainees, who have "not yet [been] convicted of any crime, the question is whether prison conditions amount to punishment of the detainee" under *Bell,* and "[a] condition may amount to punishment if it is not reasonably related to a legitimate [institutional] goal—if it is arbitrary or purposeless." *Id.* (second alteration in original) (citations and internal quotation marks omitted).

II. THE CIRCUIT SPLIT PRESENTS AN IMPORTANT ISSUE WHETHER THE EIGHTH AMENDMENT STANDARD FORMULATED TO PROTECT CONVICTED PRISONERS FROM "CRUEL AND UNUSUAL PUNISHMENTS" SHOULD BE APPLIED TO PREVENT "PUNISHMENT" OF PRETRIAL DETAINEES

The Circuit split raises important questions about the scope of constitutional protection accorded to pretrial detainees. The choice of constitutional standards is important because pretrial detainees and convicted prisoners have fundamentally different rights: the Due Process Clause prohibits any punishment before conviction, and the Eighth Amendment prohibits the cruel and unusual punishment of prisoners. The constitutional standards formulated to protect these rights are also fundamentally different: *Bell* provides in part that courts can infer an unconstitutional intent to punish from an essentially objective determination that the conditions accompanying detention are not reasonably related to a legitimate, nonpunitive end or are excessive in relation to that end; the Eighth Amendment standard requires a subjective inquiry whether an official acted with a particular degree of culpability—deliberate indifference. As the decision below squarely illustrates, the threshold for showing that pretrial detention conditions amount to punishment under *Bell* is lower than the threshold for showing that prison conditions amount to cruel and unusual punishment. This lower threshold is a product of "concern that a State would attempt to punish a detainee for the crime for which he was indicted via preconviction holding conditions." *Sandin v. Connor*, 515 U.S. 472, 484 (1995).

The decisions of the Eighth Circuit and of four other circuits that "deliberate indifference is the appropriate standard of culpability," App. 22a, for challenges to pretrial detention conditions raise this threshold. *Bell*, which "care-

fully outlined the principles to be applied in evaluating the conditions of pretrial detention," *Block*, 468 U.S. at 584, does not require any showing that officials acted with a particular degree of culpability.

A. Pretrial detainees—"persons who have been charged with a crime but who have not yet been tried on the charge" —and convicted prisoners have different constitutional rights. *Bell*, 441 U.S. at 523. The "State does not acquire the power to punish . . . until after it has secured a formal adjudication of guilt in accordance with due process of law." *Id.* at 535 n. 16 (internal quotation marks omitted). Given the importance of the State's compliance "with the constitutional guarantees traditionally associated with criminal prosecutions," pretrial detainees cannot be punished at all. *Id.* at 535 & n. 16 ("Due process requires that a pretrial detainee not be punished."); *see, e.g., Sandin*, 515 U.S. at 484 ("[A] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.") (internal quotation marks omitted); *United States v. Salerno,* 481 U.S. 739, 747 (1987) (distinguishing between "impermissible punishment" and "permissible regulation" of pretrial detainees); *see also McGinnis v. Royster*, 410 U.S. 263, 273 (1973) ("It would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with the presumption of innocence."). Convicted prisoners, however, "may be punished." *Bell,* 441 U.S. at 535 n. 16. The Eighth Amendment, which assumes the State's power to punish "a sentenced inmate," prohibits only "cruel and unusual" punishment. *Id.*

The rights of pretrial detainees and of convicted prisoners have different sources, and the Court has frequently suggested that "[t]he Due Process Clause provides broader protection than does the Eighth Amendment." *Davidson v. Cannon*, 474 U.S. 344, 358 (1986) (Blackmun, J., dissenting); *see Sandin*, 515 U.S. at 484-85 (distinguishing procedural due

process rights of pretrial detainees and convicted prisoners); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992) (decisions about forced medication which affect a pretrial detainee's trial rights may warrant closer scrutiny than similar decisions for inmates who have already been tried and convicted); *Graham v. Connor*, 490 U.S. 386, 395 n. 10 (1989) (distinguishing protection of pretrial detainees and convicted prisoners from the use of excessive force); *see also Youngberg v. Romeo,* 457 U.S. 307, 321-22 (1982) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.").

B. *Bell*'s due process test, which is designed to protect pretrial detainees from punishment, and the Eighth Amendment deliberate indifference test, which is designed to protect convicted prisoners from cruel and unusual punishment, are significantly different. Comparison of the two constitutional standards shows the importance of the fact of conviction: pretrial detainees have a lower threshold for establishing unconstitutional conditions of confinement under *Bell* than convicted persons under the Eighth Amendment deliberate indifference standard.

Under *Bell*, the central inquiry in determining whether pretrial detention conditions "amount to punishment in the constitutional sense of that word" is "whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." 441 U.S. at 538. In the absence of "an expressed intent to punish on the part of detention facility officials," a court should determine whether an "alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it.]" *Id.* (alteration in original) (internal quotation marks omitted). On the one hand, "if a particular condition or restriction of pretrial

detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment." *Id.* at 539 (internal quotation marks omitted). On the other hand, "if a restriction or condition is not reasonably related to a legitimate goal . . . a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Id.*

Bell, in short, outlines two means of establishing that pretrial detention conditions amount to punishment: (1) a showing that a condition of confinement was imposed with an express intent to punish or, alternatively, (2) an inference of intent to punish from an essentially objective determination whether pretrial detention conditions are reasonably related to a legitimate nonpunitive end or are excessive in relation to such an end. In later cases, the Court has considered both means of establishing that restrictions and conditions accompanying pretrial detention amount to punishment. In *United States v. Salerno*, the Court upheld the Bail Reform Act. 481 U.S. 739 (1987). The Court found that Congress had not "formulate[d] the pretrial detention provisions as punishment for dangerous individuals." *Id.* at 747. It also made an objective determination that "preventing danger to the community is a legitimate regulatory goal" and that "the incidents of pretrial detention [are not] excessive in relation to the regulatory goal." *Id.* The Court read the *Bell* due process test in a similar fashion in *Block v. Rutherford*, 468 U.S. 576 (1984), in upholding a jail policy denying pretrial detainees contact visits. There was no finding that the purpose of the policy was "to punish the inmates." *Id.* at 585. The Court also made an objective determination that "there is a valid, rational connection between a ban on contact visits and internal security of a detention facility" and that the "flat prohibition on contact visits" was not an "excessive response to . . . security objectives." *Id.* at 586, 588.

Although *Bell* provides in part for an essentially objective inquiry whether a particular pretrial detention condition is reasonably related to a legitimate nonpunitive objective, the Court has rejected a purely objective test as the measure of a prisoner's right to be free from cruel and unusual punishment under the Eighth Amendment. *See Farmer*, 511 U.S. at 837. Instead, the Eighth Amendment standard has both an objective component and a subjective component. To satisfy the objective component, prisoners must show that the conditions of confinement "pos[e] a substantial risk of serious harm." *Id.* at 834. The subjective component "follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.'" *Id.* at 834 (quoting *Wilson*, 501 U.S. at 297). As the Court has explained, "[t]o violate the Cruel and Unusual Punishments Clause, a prison official must have a sufficiently culpable state of mind," and "[i]n prison-conditions cases that state of mind is one of deliberate indifference to inmate health or safety." *Id.* (internal quotation marks and citation omitted). To be "deliberately indifferent," a prison official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837.

The decision in the case below squarely illustrates the difference between the two standards. Absent any allegation that pretrial detention conditions are imposed with an express intent to punish, courts inquire under *Bell* whether these conditions are "reasonably related to a legitimate governmental objective" or whether they are "excessive" in relation to that purpose. 441 U.S. at 538-39. The Court in *Block* made an essentially objective determination that a prohibition on contact visits was reasonably related to security interests and not excessive. 468 U.S. 586-88. Similarly, the inquiry in the case below would have been whether close confinement of pretrial detainees who are not subject to even minimal

screening to detect a serious, highly contagious disease like tuberculosis is "reasonably related" to legitimate economic efficiency and security objectives or whether such conditions are excessive in relation to these objectives. In making this determination, the court below would have been mindful of the Court's repeated caution about "the very limited role that courts should play in the administration of detention facilities." *Block*, 468 U.S. at 584; *see also Bell*, 441 U.S. at 540 n. 23 (Courts should defer to the expert judgment of detention officials "[i]n determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion.").

Instead of applying *Bell*, the Eighth Circuit applied the Eighth Amendment deliberate indifference test, which has "both an objective and a subjective component." App. 22a. Butler's evidence that he had contracted tuberculosis at a pretrial detention facility was sufficient to survive a summary judgment motion on the objective component: exposure to other detainees "with active TB cases . . . created an unreasonable risk of serious harm to health." App. 22a. The pretrial detainee could not show, however, that Sheriff Fletcher "act[ed] with deliberate indifference to this risk of harm." App. 23a. This "subjective component of deliberate indifference require[d] proof that [the official] actually knew of and *recklessly disregarded* [a] substantial risk of serious harm" App. 23a (internal quotation marks omitted).

C. This degree of culpability—deliberate indifference—raises the threshold for pretrial detainees to establish that detention conditions amount to punishment. It reduces the scope of constitutional protection accorded to pretrial detainees to the level of protection accorded to convicted prisoners. The imposition of this degree of culpability calls directly into question the essentially objective inquiry outlined in *Bell*: "a court permissibly may infer that the

purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees" if that restriction or condition is not reasonably related to a legitimate goal or if it is excessive. 441 U.S. at 539. The Court should review the decision below to resolve the circuit split and to determine whether the principles "carefully outlined" in *Bell* for evaluating the conditions accompanying pretrial detention, *Block*, 468 U.S. at 584, should be modified to incorporate the degree of culpability—deliberate indifference—required to establish a violation of convicted prisoners' Eighth Amendment rights not to be subject to cruel and unusual punishment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

K. LEE MARSHALL
BRYAN CAVE LLP
One Metropolitan Sq., Ste. 3600
St. Louis, Missouri 63102
(314) 259-2000

* Counsel of Record

D. BRUCE LA PIERRE *
Appellate Clinic
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
St. Louis, Missouri 63130
(314) 935-6477

Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil File No. 03-5760 (JRT/AJB)

RONALD BUTLER,

Plaintiff,

v.

BOB FLETCHER,

Defendant.

REPORT AND RECOMMENDATION

THIS MATTER is before the Court, United States Magistrate Judge Arthur J. Boylan, on Plaintiff's motion to compel disclosure and Defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56. Plaintiff's underlying *pro se* complaint alleges violations of constitutional rights during his incarceration at the Ramsey County Adult Detention Center ("ADC"). The Plaintiff appears *pro se*, and the Defendant appears by David F. MacMillan, Assistant Ramsey County Attorney. The matter has been referred to the undersigned Magistrate Judge for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1. For the reasons which follow, it is ordered that Plaintiff's motion be denied and recommended that Defendant's motion be granted and the case dismissed with prejudice.

I. BACKGROUND

Plaintiff Ronald A. Butler ("Plaintiff") is currently serving a 144-month sentence imposed pursuant to a guilty plea entered on the charge of criminal sexual conduct in the first

degree. *See Butler v. State*, No. C9-02-121, 2002 WL 31056624 at *1 (Minn. Ct. App. 2002). Plaintiff brings this action pursuant to 42 U.S.C. § 1983, alleging that his civil rights under the Fifth, Eighth and Fourteenth Amendments were violated when he contracted tuberculosis while incarcerated at the ADC as a result of Defendant's inaction or indifference. *See Compl.*, ¶¶ I(B)(5) and IV; (Doc. No. 1); *Mem. in Support of Compl.*, p. 2, 12, 17; (Doc. No. 2). Defendant is the Ramsey County Sheriff and is the public official responsible for the operation and policies of the ADC.[1] *Fletcher Aff.*, ¶¶ 2-3; (Doc. No. 35); Minn. Stat. § 387.11.

A. Tuberculosis: Epidemiology, Diagnosis and Treatment

In conjunction with the Motion for Summary Judgment, Defendant submitted an affidavit by Dr. Neal Holtan ("Dr. Holtan"), the medical director of the Ramsey County Public Health department and the physician for the Public Health Department's tuberculosis clinic, which sets forth the epidemiology, diagnosis and treatment of tuberculosis.[2] *Holtan Aff.*, ¶¶ 3-15; (Doc. No. 31). Tuberculosis is a pulmonary disease, and persons infected will have either an active case or a latent case. *Id.*, ¶ 5. An individual with an active case is contagious, and the disease can damage the individual's lungs or other organs, and if untreated can be fatal. *Id.*, ¶¶ 5-6. An individual with a latent case is not contagious, and the tuber-

---

[1] Prior to December 28, 2003, the ADC was located in downtown St. Paul at 14 West Kellogg Boulevard. *Flecther Aff.*, ¶ 4. This is the facility where Plaintiff was incarcerated. On December 4, 2003, a new detention facility was completed at 425 Grove Street in St. Paul, and the Kellogg Boulevard facility was shut down. *Id.*, ¶¶ 7-8. The acronym "ADC," as used in this Report and Recommendation, refers to the Kellogg Street facility where Plaintiff was incarcerated.

[2] In *DeGidio v. Pung*, Eighth Circuit Court of Appeals Judge Diana E. Murphy, at the time a United States District Judge of this Court, also discussed in detail tuberculosis infection, diagnosis and control. *See* 704 F.Supp. 922, 924-28 (D.Minn. 1989), *aff'd* 920 F.2d 525 (8th Cir. 1990).

culosis bacilli are present in the body but rendered dormant by the body's immune system and do not actively threaten the individual's health. *Id.*

Tuberculosis is transmitted when an individual with an active, untreated case and bacilli in their lungs, coughs, sneezes, or otherwise exhales the bacilli into the air where it can be inhaled by other individuals. *Id.* ¶ 7. Individuals who inhale the tuberculosis bacilli can, but do not always, become infected. *Id.* Generally, fairly prolonged exposure to an infected person is required before an uninfected person will contract tuberculosis. *Id.* An individual with active tuberculosis may have symptoms including cough, fever, weight loss, night sweats and constant tiredness. *Id.*, ¶ 8. The protocol for diagnosis of tuberculosis is to first administer a Purified Protein Derivative ("PPD"), commonly known as a Mantoux test, which involves injecting an individual with a standard dose of Tuberculin. *Id.*, ¶ 9. The injection site is "read" between 48 and 72 hours after the injection is administered, and if the individual develops a palpable, raised, hardened area (an "induration"), the area is measured. *Id.* For individuals in correctional facilities, if the induration is 10mm or greater, the individual is deemed positive for tuberculosis. *Id.*

Both individuals with active tuberculosis and latent inactive tuberculosis will have positive PPD tests. *Id.* ¶ 10. Individuals with latent inactive tuberculosis will not have other symptoms or represent a health risk for those with whom they come in contact. Id. In order to determine whether an individual with a positive PPD test has active tuberculosis, it is necessary to conduct a chest x-ray and a confirming sputum test in which a sample of the material the individual coughs up is analyzed for the presence of tuberculosis bacilli. *Id.*, ¶ 11. An incarcerated individual with a confirmed, active case of tuberculosis should not be confined in the general population of a correctional facility. *Id.*, ¶ 13. Rather, such an individual should be isolated from uninfected individuals for

treatment. *Id.*, ¶ 13. Once treatment has been started, and the individual is no longer infectious, the individual can be returned to the general population. *Id.*

B. Tuberculosis Protocol at the ADC

All inmates at the ADC are interviewed upon intake regarding whether they have any infectious diseases or symptoms suggestive of tuberculosis. *Fletcher Aff.*, ¶ 10; Exh. A, 407.11; Exh. B-2. Inmates incarcerated at the ADC are administered a Mantoux test within fourteen days of admission,[3] and the test is read within 48-72 hours after administration. *Berg Aff.*, ¶8; Exh. A; (Doc. No.32). If an inmate has a positive reaction to the Mantoux test, or if the individual has symptoms suggestive of tuberculosis, a chest x-ray is given within 72 hours. *Id.* If the chest x-ray is indicative of tuberculosis and there are no other symptoms, the individual is housed separately and sputum examination is conducted. *Id.* If the chest x-ray is indicative of tuberculosis and there are symptoms, the individual is transferred to the hospital for further evaluation including a sputum examination. *Id.* Such an individual will be housed at the hospital until tuberculosis has been ruled out as a diagnosis. *Id.*

---

[3] At some point in time, the tuberculosis screening protocol was changed from screening inmates within seven days of admission to screening within fourteen days of admission. *Berg Aff.*, Exh. A, p. 2 (in the sentence setting forth the time period for screening, the number 7 is crossed out and 14 is handwritten on the document). The fourteen day period accords with the requirements of Minnesota State law. *See* Minn. Stat. § 144.445, Subd. 1 ("All persons detained or confined for 14 consecutive days or more in facilities operated, licensed, or inspected by the Department of Corrections shall be screened for tuberculosis with either a Mantoux test or a chest roentgenogram (x-ray) as consistent with screening and follow-up practices recommended by the United States Public Health Service or the Department of Health[.]").

C. Plaintiff's Pre-Conviction Detention

On July 7, 2001, Plaintiff was arrested and taken to the Ramsey County Adult Detention Center ("ADC"). *St. German* [sic] *Aff.*, ¶ 4; (Doc. No. 34). From July 7, 2001, to July 10, 2001, Plaintiff was in administrative segregation, and on July 10, 2001, he was transferred to the general inmate population and assigned to a shared cell. *Id.*, ¶ 5. On July 16, 2001, Plaintiff was transferred to the Ramsey County Workhouse due to overcrowding at the ADC. *Id.*, ¶ 6. A Mantoux test was administered at the Ramsey County Workhouse, and on July 21, 2001, a reading of the test was negative. *Mem. in Support of Compl.*, p. 6. On July 26, 2001, Plaintiff was transferred to the Washington County Jail and on August 16, 2001, he was returned to the ADC where he was again confined in the general population in a two person cell. *St. Germain Aff.*, ¶ 7. On September 6, 2001, Plaintiff was again transferred to the Washington County Jail. *Id.* He remained there until he was returned to the ADC on October 18, 2001. *Id.* Plaintiff remained at the ADC until he was transferred to the custody of the Commissioner of Corrections of the State of Minnesota on October 31, 2001. *Id.* Another Mantoux test was administered after transfer to the Commissioner of Corrections and a subsequent reading was positive for tuberculosis bacilli. *Mem. in Support of Compl.*, p. 7.

II. DISCUSSION

Plaintiff alleges violations of his Procedural Due Process rights and Substantive Due Process rights under the Fourteenth Amendment and violations of his Eighth Amendment rights. *Id.*, p. 12-18. The core allegation of Plaintiff's claims is that the ADC had inadequate safeguards in place to prevent Plaintiff from contracting tuberculosis. Plaintiff specifically contends that the policy of "double-celling" inmates at the ADC was tantamount to "rolling the dice" with respect to the possibility that inmates would catch or spread communicable diseases. *Id.*, p. 10-11. Plaintiff also contends that it is indis-

putable that he contracted tuberculosis while incarcerated at the ADC. *Response to Mot. for Summ. J.*, p. 1-2; (Doc. No. 37).

Defendant seeks to dismiss Plaintiff's complaint arguing that: 1) the undisputed evidence shows that no person with active, communicable tuberculosis was confined in the ADC contemporaneously with Plaintiff; 2) the undisputed evidence shows that Plaintiff was not impermissibly deprived of his procedural or substantive due process rights; and 3) Plaintiff has not shown that his Eighth Amendment rights were violated. *See Mem. in Support of Mot. for Summ. J.*, p. 9-15; (Doc. No. 30).

A. Plaintiff's Discovery Motion

As an initial matter, the Court must address Plaintiff's Motion to Compel Disclosure, filed pursuant to Fed. R. Civ. P. 37, 26(a) and 26(e)(1). (Doc. No. 27). Plaintiff previously filed a Motion for Production of Documents, which was denied by this Court as Moot, based in part on Defendant's assurance that documents would be produced. (Doc. No. 25, 26). Plaintiff's current Motion refers in part to the documents which were produced by Defendant, disputing some information provided and also asking for more information. Plaintiff did not attach any of the documents or responsive information referenced, and the Court has no way of placing his current requests in context. Plaintiff also requests information related to inmates he believes he was incarcerated with at the ADC who may have been infected with tuberculosis. Such a request appears to be duplicative to Plaintiff's previous Motion for Production of Documents. Plaintiff again asks for appointment of counsel, and requests that this Court order Defendant to "disclose completely" and to "cease misleading, false response[s]." The Court deems Plaintiff's Motion largely duplicative and irrelevant. Furthermore, there is no indication that Plaintiff conferred with Defendant regarding the re-

quested discovery as required by Fed. R. Civ. P. 37(a)(2)(A). Plaintiff's Motion is denied.

B. Summary Judgment Standard of Review

Summary judgment is appropriate where there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. Catrett*, 477 U.S. 317, 322-23 (1986); *Unigroup. Inc. v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1219-20 (8th Cir. 1992). The nonmoving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial. *See Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The Court must view the evidence, and the inferences drawn from the evidence, in the light most favorable to the nonmoving party. *See Enter. Bank v. Magna Bank*, 92 F.3d 743, 747 (8th Cir. 1996). However, "summary judgment procedure is properly regarded not as a disfavored shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just speedy, and inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327.

C. Plaintiff's Claims

Plaintiff brings claims under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Because the events relevant to this matter occurred when Plaintiff was a pretrial detainee, his claims are most appropriately analyzed under the Due Process Clause of the Fourteenth Amendment rather than Eighth Amendment. *Crow v. Montgomery*, 403 F.3d 598, 601 (8th Cir. 2005). A pretrial detainee's Due Process rights are violated when conditions of confinement constitute punishment which deprives the

detainee of the minimal civilized measures of life's necessities. *See Owens v. Scott County Jail*, 328 F.3d 1026, 1027 (8th Cir. 2003) (per curiam) (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979)). Pretrial detainees are "accorded protections 'at least as great' as those the Eighth Amendment affords a convicted prisoner." *Boswell v. County of Sherburne*, 849 F.2d 1117, 1121 (8th Cir. 1988) (quoting *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983)). The general standard applied by the Eighth Circuit is the "deliberate indifference" standard of the Eighth Amendment. *See, Crow*, 403 F.3d at 601; *Owens*, 328 F.3d at 1027 (citing *Whitnack v. Douglas County*, 16 F.3d 954, 957 (8th Cir. 1994)).

While a pretrial detainee faces a lighter burden for demonstrating constitutional violations than a convicted prisoner, *see Smith v. Copeland*, 87 F.3d 265, 268 n.4 (8th Cir. 1996), a detainee must still demonstrate the elements of a deliberate indifference claim, *Hartsfield v. Colbum*, 371 F.3d 454, 457 (8th Cir. 2004). Deliberate indifference exists when a prison official knows that an inmate faces a substantial risk of serious harm to an inmate's health and fails to take reasonable measures to abate the risk. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994); *Olson v. Bloomberg*, 339 F.3d 730, 735 (8th Cir. 2003). To prove deliberate indifference, a plaintiff must show that the official: 1) knew of a substantial risk of serious harm to the plaintiff; and 2) disregarded or was deliberately indifferent to the risk by failing to take reasonable measures to abate it. *See Pagels v. Morrison*, 335 F.3d 736, 740 (8th Cir. 2003). Mere negligence or malpractice is insufficient to rise to a constitutional violation. *Dulany v. Carnahan*, 132 F.3d 1234, 1239 (8th Cir. 1997) (citing *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976)).

Defendant first argues that the record contains only unsupported allegations that Plaintiff contracted tuberculosis at the ADC. Defendant argues that Plaintiff has not identified any-

one he shared a cell with who had a medically confirmed case of tuberculosis or that anyone he shared a cell with exhibited any of the symptoms of active tuberculosis. *See Mem. in Support of Mot. For Summ. J.*, p. 10. Defendant further asserts that, in fact, there was no inmate with active tuberculosis in the ADC in 2001. *Id., see also Berg Aff.*, ¶ 9 (stating that during her tenure, there has been only one case of active tuberculosis, which occurred in 1999). The Court acknowledges that Plaintiff's factual allegations are tenuous and speculative, and Plaintiff most likely has not met his burden to set forth specific facts showing that there is a genuine issue for trial. *See. Anderson v. Liberty Lobby*, 477 U.S. at 256; *see also Roberson v. Bradshaw*, 198 F.3d 645, 648 (8th Cir. 1999) (reiterating that a medical need or deprivation must be obvious to a layperson or supported by medical evidence); *Aswegan v. Henry*, 49 F.3d 461, 464 (8th Cir. 1995) (same). Nonetheless, the Court need not decide this matter on the sufficiency of Plaintiff's factual allegations as to whether he contracted tuberculosis while detained at the ADC. As explained below, even assuming that Plaintiff did contract tuberculosis while detained at the ADC, Plaintiff's claims must still be dismissed.

With respect to the first element of the deliberate indifference analysis, there is no dispute that Defendant was aware that tuberculosis poses a potentially serious health risk to incarcerated individuals. In 1993, the Minnesota State Legislature enacted Minn. Stat. § 144.445, which established screening procedures for incarcerated individuals and employees of correctional institutions. *See* Minn. Laws 1993, c. 167, § 6 (eff. Jan. 1, 1994). Pursuant to Minn. Stat. § 387.11, Defendant has charge and custody of the ADC and was responsible for implementing ADC policy regarding tuberculosis screening and containment . *See Fletcher Aff.*, ¶¶ 3, 9. As the official in charge of implementing and overseeing the policy. Defendant necessarily knew of the risk posed by tuberculosis. Thus, the issue in this matter is whether Defen-

dant disregarded or was deliberately indifferent to the risk posed by tuberculosis.

Plaintiff asserts that Defendant was deliberately indifferent to the serious health risk of tuberculosis by not immediately screening detainees for tuberculosis and by housing detainees in two-person cells. *See Mem. in Support of Compl.*, p. 14. Plaintiff urges the Court to look to the procedures utilized by the Los Angeles County Jail to control the potential spread of tuberculosis as the standard against which the ADC should be measured.[4] *Id.*, p. 14-15 (citing *Jeffries v. Block*, 940 F.Supp. 1509, 1515 (C.D.Cal. 1996)). The Court questions whether the policy of the Los Angeles County Jail, assuming that it has not been modified in the intervening time, is the gold standard that Plaintiff seems to think. The Court also sees significant differences between Ramsey County and Los Angeles County with respect to climate, population, relevant state law, and other factors which render comparison difficult, if not impossible. The Court thus declines to attempt any comparison between the policies of the ADC and the Los Angeles County Jail.

In any event, the question to be answered in this matter is not whether Defendant achieved some ideal, but rather

---

[4] The Los Angeles County Jail's policy was

> to ask all incoming inmates if they ever had tuberculosis, or currently had tuberculosis, and to give a chest x-ray to all inmates to discover tuberculosis. * * * Any inmate whose chest x-ray disclosed a possible finding of tuberculosis was given a second chest x-ray, skin tests and culture studies to confirm the finding. * * * The County Jail, in 1994, had in operation a "pure air germicidal system" which ventilated the cells, dorms, and hallways and made them well ventilated. * * * It was also the custom and practice in 1994, defendant Block declares, that if an inmate was discovered to have tuberculosis upon arrival at the County Jail, he was isolated and segregated from inmates who did not have tuberculosis.

Jeffries, 940 F.Supp. at 1515.

whether he exhibited deliberate indifference to the serious health risk of tuberculosis. *See Pagels*, 335 F.3d at 740. The uncontroverted evidence in the record shows that not only did Defendant take reasonable steps to abate the risk of tuberculosis, but that he showed considerable attention to the potential serious health risk of tuberculosis. The record shows that Defendant promulgated procedures governing the diagnosis and confinement of inmates with tuberculosis. *See Fletcher Aff.*, ¶¶ 9-10; Exh. B. The procedures promulgated by Defendant comply with Minnesota State law, *see* Minn. Stat. § 144.445, and were formulated in conjunction with input from the staff and director of the healthcare services unit, *Berg Aff.*, ¶ 7. Neither the fact that the ADC did not immediately screen all incoming inmates with a Mantoux test or a chest x-ray, nor the fact that the ADC housed inmates in "double-cells" comes close to the type of act or omission which comprises a constitutional violation. There is simply no material question of fact which could allow a reasonable fact-finder to conclude that Defendant acted with deliberate indifference and it is recommended that this matter be dismissed with prejudice.

III. RECOMMENDATION

Based on the foregoing, and all the files, records, and proceedings herein, it is hereby ordered that:

1. Plaintiff's Motion to Compel Disclosure (Doc. No. 27) be DENIED; and recommended that:

2. Defendant's Motion for Summary Judgment (Doc. No. 28) be GRANTED, and this matter be dismissed with prejudice.

Dated: July 14, 2005

/s/ Arthur J. Boylan
Arthur J. Boylan
United States Magistrate Judge

Pursuant to Local Rule 72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties, written objections which specifically identify the portions of the Report to which objections are made and the bases for each objection. This Report and Recommendation does not constitute an order or judgment from the District Court and it is therefore not directly appealable to the Circuit Court of Appeals. Written objections must be filed with the Court before August 1, 2005.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil File No. 03-5760 (JRT/AJB)

RONALD BUTLER,

Plaintiff,

v.

BOB FLETCHER,

Defendant.

ORDER

Ronald A. Butler, pro se plaintiff;

David F. MacMillan, Esq., Assistant Ramsey County Attorney, for the defendant, Bob Fletcher.

Based upon the Report and Recommendation by United States Magistrate Judge Arthur J. Boylan dated July 14, 2005, with all the files and records, and no objections having been filed to said Recommendation, IT IS HEREBY ORDERED that;

1. Plaintiff Ronald Butler's Motion to Compel Disclosure (Doc. No. 27) is DENIED; and

2. Defendant's Motion for Summary Judgment (Doc. No. 28) is GRANTED, and this matter is dismissed with prejudice.

Dated: August 2, 2005
at Minneapolis, Minnesota

/s/ John R. Tunheim
John R. Tunheim
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case Number: 03-5760 JRT/AJB

RONALD BUTLER

v.

BOB FLETCHER

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

Plaintiff Ronald Butler's motion to compel discovery is denied. Defendant's motion for summary judgment is granted and this matter is dismissed with prejudice.

August 3, 2005
Date

RICHARD D. SLETTEN, CLERK
/s/ Victoria Moralez
(By) Victoria Moralez, Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-3480

RONALD BUTLER,
Plaintiff-Appellant,

v.

ROBERT FLETCHER,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Minnesota.

Submitted: June 14, 2006
Filed: October 13, 2006

Before LOKEN, *Chief Judge*, BEAM and ARNOLD, *Circuit Judges.*

LOKEN, *Chief Judge.*

Ronald Butler was detained at the Ramsey County Adult Detention Center (ADC) in St. Paul, Minnesota, pending criminal charges. After his conviction, Butler was transferred to a prison, where he tested positive for tuberculosis (TB). He filed this § 1983 damage action against Sheriff Robert Fletcher, alleging that Fletcher violated Butler's Substantive Due Process rights by failing to adopt and implement adequate safeguards protecting ADC inmates from TB infection.

The district court[1] granted Fletcher's motion for summary judgment, concluding that a reasonable jury could not find that Fletcher acted with deliberate indifference to the serious health risk TB poses to inmates and detainees. Butler appeals, arguing that the court erred in applying the Eighth Amendment standard of deliberate indifference because Butler was a pretrial detainee, that in any event he presented sufficient evidence of deliberate indifference, and that the court committed procedural errors. Reviewing the grant of summary judgment *de novo*, we affirm.

I.

Butler sued Sheriff Fletcher in his official capacity, so in essence, this is a suit against Ramsey County. "A county is liable [under § 1983] if an action or policy itself violated federal law, or if the action or policy was lawful on its face but led an employee to violate a plaintiff's rights and was taken with deliberate indifference as to its known or obvious consequences." *Pietrafeso v. Lawrence County*, 452 F.3d 978, 982 (8th Cir. 2006), quoting *Board of County Comm'rs v. Brown*, 520 U.S. 397, 407 (1997). Here, Butler alleges that he spent most of his time at ADC in two-person cells and in larger holding cells, where as many as twenty-six short-term detainees were held under deplorable sanitary conditions. He asserts that Fletcher's policy of placing short-term detainees in multi-person cells without an initial TB screening inadequately protects ADC detainees from the serious health risk of TB. Butler has neither alleged nor shown that any Ramsey County employee violated his rights. Therefore, the § 1983 issue is whether the County's policies for diagnosing and treating TB in its detention facilities violated Butler's constitutional rights.

---

[1] The Honorable JOHN R. TUNHEIM, United States District Judge for the District of Minnesota, based upon the Report and Recommendation of the Honorable ARTHUR J. BOYLAN, United States Magistrate Judge for the District of Minnesota.

It is well known that TB is a serious disease harmful to the lungs and other organs and that prisons are "high risk environments for tuberculosis infection." *DeGidio v. Pung*, 920 F.2d 525, 527 (8th Cir. 1990). Minnesota responded to this risk by enacting detailed statutory provisions that require mandatory tuberculosis screening of correctional facility inmates and employees. Minn. Stat. § 144.445.

To support his summary judgment motion, Sheriff Fletcher submitted affidavits describing the nature of the TB health risk at ADC, the policies he has implemented to avoid TB infections, and Butler's period of detention. The affidavit of Dr. Neal Holtan, a physician at the Ramsey County Public Health Department TB clinic, explained that infected persons have either active TB, which is contagious, or inactive TB, which is suppressed by the immune system and not contagious. TB is spread when a person with active TB coughs, sneezes, or exhales. More than a few days exposure is usually required to contract the disease. A person with active TB is no longer contagious once treatment begins. Thus, in a prison setting, an inmate diagnosed with active TB should be segregated from the general population for treatment until the inmate is no loner infectious. Dr. Holtan further explained that TB is diagnosed by conducting a Mantoux test, which identifies an infected individual 48-72 hours after the test is administered.[2] After a person is infected, the TB incubation period preceding a positive Mantoux test varies from two to twelve weeks. If the Mantoux test is positive, a chest x-ray or sputum test will reveal whether the person has active TB. *See generally* Center for Disease Control, *Prevention and Control of Tuberculosis in Correctional and Detention Facilities: Recommendations from CDC*, 55 Morbidity and Mortality

[2] A standard dose of Tuberculin is injected into a patient's forearm. The patient is considered positive for TB if the injection site develops a "palpable, raised, hardened area" measuring 10 mm or greater after 48 to 72 hours.

Wkly. Rep. RR09, July 7, 2006, available at http://www.cdc.gov/mmrw/mmrw_rr.html.

Sheriff Fletcher's affidavit averred that he promulgated a detailed Policy and Procedures Manual that governs the custody and treatment of persons detained at a Sheriff's Department facility. The Manual provides that detainees must receive an initial medical screening within 24 hours of entering ADC. The booking deputy documents this screening on a Ramsey County Medical Screening Form. In addition, the Ramsey County Medical Director adopted a protocol for the diagnosis and treatment of TB that prescribes a two-step screening process. First, the protocol provides that an "Intake Interview" shall be conducted:

> Inmates will be interviewed upon intake regarding whether they have any infectious diseases or symptoms suggestive of tuberculosis including cough, weight loss, fever, night sweats or loss of appetite. If the inmate reports or exhibits or acknowledges any symptoms suggestive of tuberculosis, Correctional Medical Staff will be notified as soon as possible and a chest x-ray will be taken within 72 hours.

Second, the protocol provides that a Mantoux test shall be administered within fourteen days, as § 144.445, subd. 1, requires. If the test is positive, a chest x-ray is taken. Whenever a chest x-ray suggests active TB, the inmate must be transferred to the hospital and treated.

The affidavit of Deputy Sheriff John St. Germain reported that Butler arrived at ADC on July 7, 2001, and transferred to a two-person cell in the general inmate population on July 10. On July 16, he was sent to a different Ramsey County detention facility, where he was given a Mantoux test on July 21, two weeks after his initial detention. The test result was negative. Butler returned to ADC on August 16, was again sent to a different facility on September 6, and returned to

ADC on October 18. On November 1, after transferring to a correctional facility to begin his prison sentence, Butler tested positive for TB. Thus, although Butler was detained continuously from his negative Mantoux test on July 21 until he tested positive on November 1, he was housed at ADC only from August 16 to September 6 and from October 18 to 31.

The affidavit of Jane Berg, manager of the health care program provided by the Ramsey County Public Health Department to the Sheriff's Department, averred that no ADC inmate "is known to have had an active case of tuberculosis since 1999."

In response to the motion for summary judgment, Butler asserted that he was not initially screened at ADC, that many inmates were not detained at ADC long enough to receive a Mantoux test, and that conditions in the overcrowded holding cells were "abhorrent." He further alleged that the fact he contracted TB at ADC "is, quite frankly, indisputable." Butler also submitted an affidavit from former inmate Charles Burns averring that, while incarcerated at ADC from October 26, 2001, to February 13, 2002, Burns's cell mate related that he had a positive Mantoux test followed by a chest x-ray and was required to take antibiotics. Finally, Butler moved for the appointment of counsel and to compel additional discovery.

The magistrate judge issued a Report and Recommendation that Fletcher's motion for summary judgment be granted and Butler's procedural motion be denied. The magistrate judge reasoned that, because Fletcher promulgated policies for the diagnosis and treatment of TB that complied with § 144.445 and were formulated with input from the director of health care services, no reasonable fact-finder could find that Fletcher acted with deliberate indifference to the serious health risk that TB poses in a prison environment. When Butler failed to file timely objections to the Report and Recommendation, the district court granted summary judgment and dismissed the complaint with prejudice.

II.

On appeal, relying on *Bell v. Wolfish*, 441 U.S. 520 (1979), Butler primarily argues that the district court erred in applying the Eighth Amendment standard of deliberate indifference because, as a pretrial detainee, Butler was protected by the Fourteenth Amendment's guarantee of substantive due process. In *Bell*, a conditions of confinement case, the Supreme Court explained that the Eighth Amendment protects a convicted inmate from "cruel and unusual" punishment, whereas the Due Process Clause restricts punishing a detainee prior to an adjudication of guilt. Therefore, "[i]n evaluating the constitutionality of conditions or restrictions of pretrial detention . . . the proper inquiry is whether those conditions amount to punishment of the detainee." 441 U.S. at 535.

Prior to *Bell*, the Supreme Court held that deliberate indifference to a prisoner's serious medical needs "constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quotation omitted). After *Bell* noted the difference between Substantive Due Process and Eighth Amendment protections, we have recognized it is an open question but have repeatedly applied the deliberate indifference standard of *Estelle* to pretrial detainee claims that prison officials unconstitutionally ignored a serious medical need or failed to protect the detainee from a serious risk of harm. *See Vaughn v. Green County*, 438 F.3d 845, 850 (8th Cir. 2006); *Whitnack v. Douglas County*, 16 F.3d 954, 957 (8th Cir. 1994) (collecting cases). Later Supreme Court decisions, while not resolving the issue, are consistent with this approach. *See County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) ("Since it may suffice for Eighth Amendment liability that prison officials were deliberately indifferent to the medical needs of their prisoners, it follows that such deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of some-

one jailed while awaiting trial."); *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189, 198-200 & n.5 (1989); *Davidson v. Cannon*, 474 U.S. 344, 358 (1986) (Blackmun, J., dissenting).

Despite this substantial precedent to the contrary, Butler argues that the deliberate indifference standard is improper because it does not afford pretrial detainees "significantly greater protection under the Fourteenth Amendment than prisoners enjoy under the Eighth Amendment." He urges us to apply what he calls the standard in Bell, determining whether alleged inadequacies in the procedures for diagnosing TB-infected inmates were "reasonably related to a legitimate governmental objective" and were not "excessive" in relation to that purpose. We reject this contention for two reasons.

First, under *Bell*, the Substantive Due Process inquiry is whether the detainee has been improperly punished. "The infliction of punishment is a deliberate act intended to chastise or deter." *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (quotations omitted). The standard urged by Butler applies, in the absence of a showing of an express intent to punish, "to determine whether a governmental act is punitive in nature." 441 U.S. at 537. By contrast, the governmental duty to protect at issue in this case is not based on a pretrial detainee's right to be free from punishment but is grounded in principles of safety and general well-being: "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *DeShaney*, 489 U.S. at 200 (citations omitted). Pretrial detainees and convicted inmates, like all persons in custody, have

the same right to these basic human needs. Thus, the same standard of care is appropriate.

Second, the standard urged by Butler—whether conditions of pretrial detention are reasonably related to a legitimate governmental objective—was applied in *Bell* to determine whether an improper *intent* to punish may be inferred. Butler urges that it be adopted in this case as a primary standard of care, without regard to Fletcher's intent to punish. Whether a condition is *reasonably* related to a legitimate government purpose is a negligence standard. Since *Bell*, the Supreme Court has emphatically (and repeatedly) declared that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Lewis*, 523 U. S. at 849. For these reasons, we hold that deliberate indifference is the appropriate standard of culpability for all claims that prison officials failed to provide pretrial detainees with adequate food, clothing, shelter, medical care, and reasonable safety.

Butler further argues that, even if deliberate indifference is the appropriate standard of care, summary judgment was improperly granted because the record reveals a genuine issue of material fact whether Sheriff Fletcher knew ADC inmates faced a substantial risk of serious harm from TB and "disregard[ed] that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Once again, Butler would have us fashion a negligence standard of liability by taking Supreme Court language out of context. Deliberate indifference has both an objective and a subjective component. The objective component requires proof that Butler was exposed to ADC inmates with active TB cases in a manner that created an unreasonable risk of serious harm to his health. *See Helling v. McKinney*, 509 U.S. 25, 35 (1993). He presented sufficient evidence that he contracted TB at ADC to survive summary judgment on this ground.

The subjective component of deliberate indifference requires proof that Fletcher "actually knew of and *recklessly disregarded*" this substantial risk of serious harm. *Pietrafeso*, 452 F.3d at 983 (emphasis added); *see Farmer*, 511 U.S. at 837. In this case, Butler challenged health care policies adopted and implemented by the County. Those policies did not disregard the risk of tuberculosis infection at ADC. To the contrary, as the district court noted, the policies specifically acknowledged the risk and promulgated detailed procedures for the diagnosis, segregation, and treatment of ADC inmates infected with active cases of TB. Butler asserted—with virtually no supporting evidence—that the above-described initial screening procedures were not implemented at ADC. Even if true, that would be evidence that certain ADC staff negligently, or even deliberately, failed to implement lawful policies. It is not evidence that the policies themselves were unconstitutional. Thus, the district court properly dismissed this official capacity claim because the undisputed evidence demonstrated that the County implemented policies addressing the serious health risk that TB poses to ADC detainees. Sheriff Fletcher did not act with deliberate indifference to this risk of harm, whether or not he might arguably have taken other "reasonable measures to abate it."

III.

Butler's claims of procedural error require little discussion. When the district court granted Fletcher's motion for summary judgment, it denied Butler's motion to compel additional discovery responses, namely, his medical records, information about another detainee who allegedly tested positive for TB when transferred to prison the same day as Butler, and information about the medical history of one of Butler's cellmates. The motion further asked the court to appoint counsel and to extend the discovery deadline. We review the denial of this motion for abuse of discretion. *See Phillips v. Jasper County Jail*, 437 F.3d 791, 794-95 (8th Cir. 2006)

(appointment of counsel); *Life Plus Int'l v. Brown*, 317 F.3d 799, 806-07 (8th Cir. 2003) (extending deadlines); *Toghiyany v. AmeriGas Propane, Inc.*, 309 F.3d 1088, 1093 (8th Cir. 2002) (compelling discovery). Although we do not agree with the magistrate judge that the discovery requests were "largely duplicative," we do agree that they were "irrelevant" because neither the information sought—nor the appointment of counsel—could have overcome the undisputed evidence that Sheriff Fletcher and the Ramsey County Public Health Department promulgated policies and protocols that defeated Butler's official capacity claim as a matter of law. Thus, there was no abuse of discretion.

Finally, we reject the contention in Butler's pro se brief that his right to procedural due process was violated because he never received a copy of the magistrate judge's Report and Recommendation. He did not raise this issue in the district court. Moreover, we appointed counsel to represent Butler on appeal and have now reviewed *de novo* his challenge to the grant of summary judgment despite the absence of an objection to the magistrate judge's Report, a review our prior cases expressly permit. *See Taylor v. Farrier*, 910 F.2d 518, 520 (8th Cir. 1990).

The judgment of the district court is affirmed.

FILED
MAR 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-955

In The Supreme Court of the United States

RONALD A. BUTLER,

Petitioner,

v.

ROBERT FLETCHER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SUSAN E. GAERTNER
RAMSEY COUNTY ATTORNEY

DAVID F. MACMILLAN*
ANNA D. SCANLAN
50 West Kellogg Boulevard
Suite 560
St. Paul, MN 55102
(651) 266-3121

Counsel of Record *Attorneys for Respondent*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Court has twice "reserved decision on the question whether something less than the Eighth Amendment's 'deliberate indifference' test may be applicable in claims by detainees asserting violation of their due process right to medical care while in custody," *City of Canton v. Harris*, 489 U.S. 378, 388 n.8 (1989), and the circuits are now divided five to five on the directly related question:

> Whether deliberate indifference is the degree of culpability that must be shown to establish that pretrial detention conditions amount to punishment in violation of the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

A. EVEN ASSUMING A DIVISION OF OPINION AMONG THE CIRCUIT COURTS ON THE QUESTION WHETHER THE CONSTITUTIONALITY OF PRETRIAL DETENTION CONDITIONS SHOULD BE ADDRESSED UNDER A FOURTEENTH AMENDMENT DUE PROCESS STANDARD OF *BELL* OR THE EIGHTH AMENDMENT DELIBERATE INDIFFERENCE STANDARD IN THE CONTEXT OF THE PROVISION OF MEDICAL CARE AND TREATMENT, THE EIGHTH AMENDMENT STANDARD IS APPROPRIATE 8

B. SHERIFF FLETCHER'S CONDUCT DID NOT VIOLATE BUTLER'S FOURTEENTH AMENDMENT RIGHTS 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Baker v. McCollan, 443 U.S. 137 (1979) 13

Bell v. Wolfish, 441 U.S. 520 (1979) 5, 7, 8, 9, 10, 11

City of Canton v. Harris, 489 U.S. 378 (1989) 11

City of Revere v. Mass. General Hospital, 463 U.S. 239 (1983) 11

Collins v. City of Harker Heights, Tex., 503 U.S. 115 (1992) 14, 15

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 14, 15, 17

Covino v. Vermont Department of Corrections, 933 F.2d 128 (2d Cir. 1991) 10

Crow v. Montgomery, 403 F.3d 598 (8th Cir. 2005) 5

Daniels v. Williams, 474 U.S. 327 (1986) 14, 15

Estelle v. Gumble, 429 U.S. 97 (1976) 13

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 9, 10

Lareau v. Manson, 651 F.2d 96 (2d Cir. 1981) 10, 11

Owens v. Scott County Jail, 328 F.3d 1026 (8th Cir. 2003) 5

Slade v. Hampton Regional Jail, 407 F.3d 243 (4th Cir. 2005) 10

Whitnack v. Douglas County, 16 F.3d 954 (8th Cir. 1994) 5

Wolff v. McDonnell, 418 U.S. 539 (1974) 14

Wolfish v. Levi, 439 F. Supp. 114 (SDNY 1997) 8, 9

Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978) 9

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. §1983 13

U.S. Const. amend. VIII ..... *passim*

U.S. Const. amend. XIV ..... *passim*

Minn. Stat. §144.445 16

RULES

Fed.R.Civ.P. 56 4

OTHER

Center for Disease Control, *Prevention and Control of Tuberculosis in Correctional Facilities: Recommendations from CDC,* 45 Morbidity & Mortality Wkly. Rep. (June 7, 1996), *available at* http://www.cdc.gov/mmwr/PDF/rr/rr4508.pdf 12

Federal Bureau of Prisons, *Preventative Health Care* (October 2005), *available at* http://www.bop.gov/news/PDFs/phc.pdf 12

STATEMENT OF THE CASE

Ronald Butler was a pretrial detainee confined in the Ramsey County Adult Detention Center (ADC) at various times between July 7, 2001, and October 31, 2001, when he was transferred to the custody of the Minnesota Commissioner of Corrections and transferred to the Minnesota Correctional Facility (MCF) in St. Cloud, Minnesota. While he was continuously in custody between July 7 and October 31, due to occasional overcrowding at the ADC during this period, he was from time to time transferred to other detention facilities. These included the Ramsey County workhouse, another Ramsey County detention facility but one not under control of Sheriff Fletcher, and a detention facility (jail) in an adjacent Minnesota county (Washington County). As a result of such transfers, Butler was actually physically present at the ADC only between August 16 and September 6, and between October 18, 2001, and October 31, 2001 (App. 5a). While at the ADC, Butler was confined to a two-person cell. While at the Washington County facility he was placed in a one-person cell.

In accordance with Minnesota Statutes Sec. 144.445, subd. 1, Butler was administered a Mantoux test for determination as to whether he had tuberculosis symptoms within fourteen days of his confinement. This test was administered while he was confined in the Ramsey County workhouse during one of his transfers, and the results were negative. Because of the negative results, he was not further tested during his stay at the ADC or the Washington County facility.

Upon his transfer to the MCF in St. Cloud, Butler was given another Mantoux test on or about November 1, 2001. This test was positive.

Robert Fletcher is the elected Ramsey County Sheriff and was so before, during, and after Butler's confinement. First elected Sheriff in November 1994, Sheriff Fletcher is charged with and responsible for administration of the ADC and promulgating all policies and procedures governing operation of the ADC and supervision and control of detainees and his staff of deputies and unsworn personnel.

In execution of his administrative responsibilities, Sheriff Fletcher promulgated a detailed Policy and Procedures Manual which governs the custody and treatment of persons detained at the ADC (App. 18a). This manual, and a tuberculosis treatment protocol promulgated by the ADC medical director, Dr. Neal Holtan, prescribe the following TB diagnosis and treatment procedures for detainees in the ADC (App. 18a and 19a):

1. Within twenty-four hours of incarceration, the detainee receives an initial screening, usually done by booking deputies, during which the detainee is asked if he or she has any infectious diseases (such as tuberculosis), or symptoms suggestive of tuberculosis, such as night sweats, cough, fever, weight loss, or loss of appetite, or any other infectious disease or health problems.

2. Within fourteen days of admission to the ADC, the detainee is administered a Mantoux test.

3. If the Mantoux test is positive, a chest x-ray is administered to the detainee as a further diagnostic tool.

4. If the chest x-ray suggests **active** tuberculosis, the detainee is transferred to a hospital for further testing, such as a sputum test, and treatment if an active case is diagnosed. A detainee with active TB is **not** returned to the general population of the ADC until no longer contagious.

A measure of the effectiveness of this protocol and policy is the fact that during Sheriff Fletcher's tenure there has been only **one** identified case of active TB and that was in 1999.

In his complaint, Butler claimed that he did not receive the initial screening but admits that he was administered the Mantoux test within fourteen days of his incarceration, with negative results. Butler did not claim in his complaint that he exhibited any symptoms of active TB, nor did he allege in his complaint that any of his cellmates exhibited any such symptoms, and did not allege that he was denied or otherwise received inadequate medical treatment while at the ADC.

In his *pro se* complaint, Butler attributes his contracting of TB, which resulted in the positive Mantoux test he received at the MCF St. Cloud, solely to the facts that he was incarcerated in two-person cells while at the ADC, and did not receive an initial screening for tuberculosis prior to the Mantoux test he did receive.

The lone causal connection between Sheriff Fletcher's actions and Butler's positive Mantoux test made by Butler in his complaint rests on an "inferences" he draws that because he did not receive an initial screening, the inmates who shared his cell must not have received a screening, and one (or more) of them must have had an

active TB case which infected him, which would not have occurred but for the double celling.

In late November 2004, Sheriff Fletcher moved the trial court for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

In his December 29, 2004, response to Sheriff Fletcher's motion, Butler **for the first and only time** made factual allegations and complained that sanitary conditions at the ADC were unsatisfactory to him; that as many as 26 detainees were placed in holding cells five or six feet wide and ten or twelve feet in length for up to eight or more hours at a time; that heating and air conditioning were cut off from time to time; that "correction officers" took delight in closing the food tray slot, thus cutting off ventilation; that only a single toilet in the holding cell was available; and, because of those conditions, it is little wonder that he contracted tuberculosis.

In support of these allegations in his response, Butler submitted an affidavit from another inmate at the MCF, Charles Burns, who had been a pretrial detainee at the ADC between October 26, 2001, and February 13, 2002. Mr. Burns' affidavit claimed that during his confinement at the ADC, his cellmate, Kor Vang, told him that he (Vang) had had a positive Mantoux test, a chest x-ray, and was required to take antibiotics thereafter. Burns' affidavit did not contain any averments that Kor Vang exhibited any of the symptoms of an active, contagious TB infection which would have required Vang's segregation from the ADC's general population. This affidavit of Burns, despite its questionable admissibility regarding Kor Vang's statements, shows that Sheriff Fletcher's TB protocol was, in fact, being followed. Pursuant to the protocol, Vang had

received a Mantoux test; when that test was positive he received a chest x-ray, and was required to take antibiotics thereafter. Far from providing evidence that Fletcher had violated Butler's rights and exposed him to TB, this affidavit shows that Sheriff Fletcher was sensitive to the medical risk of TB infection and implemented an appropriate diagnosis and treatment program which not only treated the person with TB, but also ensured that other detainees would not be exposed to an active, contagious case of the disease.

In his summary judgment motion, Fletcher sought judgment and dismissal of Butler's complaint on two grounds; first, that Butler's **factual** allegations, even if accepted as true, were insufficient for a jury to conclude that he had contracted TB while at the ADC and second, that even if he **had** contracted TB, his Eighth and Fourteenth Amendment rights were not violated by Sheriff Fletcher's policies or actions. Both Sheriff Fletcher and the District Court recognized that because Butler was a pretrial detainee, the standards enunciated by this court in *Bell v. Wolfish*, 441 U.S. 520 (1979), that the constitutionality of the treatment of a pretrial detainee was to be measured by Fourteenth Amendment due process, rather than the Eighth Amendment cruel and unusual punishment, standards (App. 6a, 7a). Under relevant Eighth Circuit precedents (see, *Crow v. Montgomery*, 403 F.3d 598, 601 (8th Cir. 2005); *Owens v. Scott County Jail*, 328 F.3d 1026, 1027 (8th Cir. 2003) (per curiam); *Whitnack v. Douglas County*, 16 F.3d 954, 957 (8th Cir. 1994) the district court held that the "deliberate indifference" analysis which had been applied to Eighth Amendment claims was also an appropriate analysis for Butler's Fourteenth Amendment claim. (App. 8a).

While acknowledging that Butler's factual allegations were "tenuous and speculative, and [Butler] most likely has not met his burden to set forth specific facts showing there is a genuine issue for trial" with respect to whether or not his TB was in fact contracted while at the ADC, (App. 9a), the District Court did not rule on this ground for Sheriff Fletcher's motion but granted Sheriff Fletcher's motion on the ground that there were no facts from which a jury could conclude that Sheriff Fletcher's policies caused a violation of either Butler's Eighth or Fourteenth Amendment rights, employing the "deliberate indifference" standard to analyze Sheriff Fletcher's conduct.

The Eighth Circuit, in its opinion, agreed and held that deliberate indifference was the appropriate standard of culpability for pretrial detainees (App. 22a). The Eighth Circuit did, however, expand the application of the "deliberate indifference" standard to evaluation of claims concerning not only the adequacy of medical care provided pretrial detainees, but also the food, clothing, and reasonable safety afforded pretrial detainees (App. 22a).

REASONS FOR DENYING THE WRIT

As a preliminary matter it is essential to recognize the narrow scope of Sheriff Fletcher's policies and conduct which underlie and form the basis of Butler's claims. While the Eighth Circuit applied its holding to a variety of conditions of confinement issues, such as whether the public officials have provided adequate food, clothing, shelter, medical care, and reasonable safety (App. 22a), Butler's real issue, as articulated in his complaint, is

solely grounded in Sheriff Fletcher's double-celling policy, and the alleged failure to screen detainees of the ADC for TB. He did not raise other issues in his complaint. It was not until his response to Sheriff Fletcher's summary judgment motion that Butler made any allegations of overcrowding and unsanitary conditions.

To the extent Butler bases his request for review by this Court on matters not raised in his complaint, this Court should deny his petition.

Butler asserts essentially two grounds for his petition in this matter. First, that there is a division among the Circuits whether the constitutionality of pretrial detention conditions should be addressed under the Fourteenth Amendment, due process standards articulated by the Court in *Bell v. Wolfish*, 441 U.S. 520 (1979) (Petition, p. 8), or Eighth Amendment deliberate indifference standards; and second, that the division presents an important issue as to whether the Eighth Amendment standard applicable to convicted prisoners should be applied to prevent "punishment" of pretrial detainees (Petition, p. 19).

Sheriff Fletcher requests that the Petition be denied on the following grounds: first, even assuming the split in the Circuits in connection with the Eighth Amendment versus Fourteenth Amendment analysis, as applied **in this case** to the narrow issue of the constitutionality of Sheriff Fletcher's actions with respect to medical care and double celling pretrial detainees, it cannot be held, in essence, that pretrial detainees are entitled to better medical care or more spacious cells than convicted prisoners; and second, there can be no doubt that the undisputed facts in this case show that Sheriff Fletcher's policies with

respect to medical care, and double celling did not violate either Butler's Eighth Amendment right to be free of cruel and unusual punishment **or** his Fourteenth Amendment due process rights.

A. EVEN ASSUMING A DIVISION OF OPINION AMONG THE CIRCUIT COURTS ON THE QUESTION WHETHER THE CONSTITUTIONALITY OF PRETRIAL DETENTION CONDITIONS SHOULD BE ADDRESSED UNDER A FOURTEENTH AMENDMENT DUE PROCESS STANDARD OF *BELL* OR THE EIGHTH AMENDMENT DELIBERATE INDIFFERENCE STANDARD IN THE CONTEXT OF THE PROVISION OF MEDICAL CARE AND TREATMENT, THE EIGHTH AMENDMENT STANDARD IS APPROPRIATE.

The plaintiffs in *Bell*, *supra*, consisted of both pretrial detainees and convicted prisoners who were confined at the Metropolitan Correctional Center (MCC), a federal correctional facility in New York City. *Wolfish v. Levi*, 439 F.Supp. 114, 119 (SDNY 1997). At the trial court, the plaintiffs, which included both pretrial detainees and convicted inmates, presented an impressively long list of complaints about their conditions of confinement, ranging from failure to classify inmates, which resulted in total confinement of detainees who were not dangerous, *id.* at 125, 126, overcrowding leading to double celling, *id.* at 134, to lack of conjugal visits. *Id.* at 142, 143. While the list of the plaintiff's grievances included a claim of inadequate medical care, the trial court concluded that the record with respect to this claim was incomplete, and declined to rule on this medical care claim. *Id.* at 165.

Both the trial court, *id.* at p. 124, and the Second Circuit Court of Appeals on review, *Wolfish v. Levi*, 573 F.2d 118, 124 (2d Cir. 1978) recognized that pretrial detainees had constitutional rights different from convicted prisoners and evaluated the various conditions of confinement claims for pretrial detainees in light of the standard that pretrial detainees could only be subjected to those privations which inhere in their confinement or **which are justified by compelling necessities of jail administration** (Emphasis added).

This court, in *Bell* at 532, rejected the Second Circuit's compelling necessity test, and held that under the Due Process clause the appropriate inquiry into the constitutionality of the conditions of confinement of pretrial detainees was whether such conditions amounted to punishment, *id.* at 535, because the Due Process clause prohibits **punishment** prior to adjudication of guilt.

In *Bell*, this Court held that the essential question was whether the disability imposed upon pretrial detainees constituted punishment at all. The Court noted that there is a distinction to be drawn between *punitive* measures, which may not be constitutionally imposed prior to a determination of guilt, and mere regulatory restraints which may legitimately be imposed by detention center officials. Citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the Court outlined a number of tests to employ when determining whether a particular restriction is punitive:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of **scienter**, whether its operation will promote the traditional aim of

> punishment, retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry. . . .

Id. at 168-169.

This Court, in *Bell* at 538-539, distilled the above holding into a formulation that courts must decide whether a disability is imposed for the purpose on punishment, or whether there was some other legitimate governmental purpose for the disability and that absent an express intent to punish on the part of detention facility officials, the determination would depend on whether an alternative purpose for the disability existed, and whether it appeared the disability was excessive in relation to the stated alternative purpose. The Court also noted that courts were to be mindful that this inquiry springs from constitutional requirements and judicial answers to the questions must reflect that fact rather than the court's idea of how best to operate a detention facility. *Id.* at 539.

This analysis works well when applied to many of the conditions of confinement of pretrial detainees. It is effective to determine actions and claims that officials have used excessive force in dealing with a pretrial detainee, whether the imposition of fees for services provided detainees is impermissible, *Slade v. Hampton Regional Jail*, 407 F.3d 243 (4th Cir. 2005), whether overcrowding is permissible, *Lareau v. Manson*, 651 F.2d 96 (2d Cir. 1981), whether transfers within a prison population is permissible, *Covino v. Vermont Department of Corrections*, 933 F.2d

128 (2d Cir. 1991) and other conditions which, as the court noted in *Slade, supra* at 251, can be characterized as a "disability". If a particular condition of confinement can be characterized as a disability, it takes no great leap of logic to at least begin the analysis of whether the disability can be found to be punishment, and thus, absent a reasonable relationship to a non-punitive governmental objective, precluded by the Fourteenth Amendment.

This analysis, however, breaks down when applied to medical care provided detainees.[1]

The difficulty is that providing a **benefit** to detainees, particularly medical care (which is in many cases better care than they receive when they are not detained in a correctional facility) simply does not constitute the traditional notion of a disability or punishment.

This court, post *Bell*, has twice implicitly acknowledged that medical care may not lend itself to a *Bell* Due Process analysis to the exclusion of the Eighth Amendment deliberate indifference standard. These cases, *City of Canton v. Harris*, 489 U.S. 378, 388, n.8 (1989), and *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243-45 (1983) reserved ruling on whether application of the deliberate indifference analysis to claims of inadequate medical care was appropriate in Fourteenth Amendment due process

---

[1] While complete failure to provide medical care to pretrial detainees arguably could be found a disability, *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981), the facts in this case are that Sheriff Fletcher had in place a very elaborate protocol and program to address the medical needs of detainees at the ADC, and hence cannot be found to have completely failed to provide medical care.

challenges to alleged inadequacies in the level of medical care by pretrial detainees.

The difficulty applying any standard other than deliberate indifference is clear and illustrated in this case by Butler's claim; any analysis of whether the medical care provided a pretrial detainee is "reasonably" related to a non-punitive governmental objective quickly turns into an analysis of the reasonableness of the medical care provided; and whether the existence of different opinions as to the adequacy of the care can be used to show that the governmental officials' actions were **not** reasonable.

This is precisely one of Butler's arguments before the Eighth Circuit. In his appeal, Butler cites standards for prevention of tuberculosis promulgated by the Center for Disease Control, *Prevention and Control of Tuberculosis in Correctional Facilities: Recommendations from CDC*, 45 Morbidity and Mortality Wkly. Rep. (June 7, 1996), *available at* http://www.cdc.gov/mmwr/PDF/rr/rr4508.pdf and the Federal Bureau of Prisons ("BOP") in Federal Bureau of Prisons, *Preventive Health Care* (October 2005), *available at* http://www.bop.gov/news/PDFs/phc.pdf, for the proposition that because these organizations provide different protocols for TB detection and treatment, a genuine issue for trial exists to determine whether Sheriff Fletcher's steps were reasonable and, hence, not punishment.

The difficulty with this, and any other, analysis which permits a complainant to argue that since there are other organizations or professionals who have different approaches to medical care, a triable fact issue as to the reasonableness of a public official's conduct is created. This, as the Eighth Circuit noted in its opinion is a **negligence** standard (App. 22a). It would, if adopted, convert

virtually every pretrial detainee's complaint of the medical care provided into, essentially, a medical malpractice action – a claim which this Court has emphatically stated is **not** a constitutional or other civil right subject to protection under 42 U.S.C. §1983. *Estelle v. Gumble*, 429 U.S. 97, 106 (1976); *Baker v. McCollan*, 443 U.S. 137, 146 (1979).

Given that this Court has held that claims of mere medical malpractice do not support a claim under 42 U.S.C. §1983, it follows that for this Court to find that the deliberate indifference analysis applied by the Eighth Circuit is not appropriate and that an analysis which evaluates the *reasonableness* of a public official's medical care policy and procedure is necessary, courts will have to fashion an analytical tool which is in the twilight zone between deliberate indifference and mere medical malpractice. That zone is too small and too fraught with the danger that every pretrial detainee's claims of inadequate medical care will virtually always create a triable fact issue.

Butler's application should be denied because the Eighth Circuit's reliance on the deliberate indifference standard is entirely appropriate in cases involving medical treatment of pretrial detainees. Application of the deliberate indifference standard avoids the medical malpractice issue without undermining the Fourteenth Amendment due process rights of pretrial detainees.

In addition, as the Eighth Circuit noted, application of the Eighth Amendment deliberate indifference standard insures that convicted prisoners will receive the same kind of medical care and treatment as pretrial detainees. Any other standard risks creation of a two-tiered system in

which pretrial detainees receive better medical care than convicted inmates – hardly a standard which comports with the notion that all persons confined by government have the same rights to basic human needs.

B. SHERIFF FLETCHER'S CONDUCT DID NOT VIOLATE BUTLER'S FOURTEENTH AMENDMENT RIGHTS.

Even if this Court finds that there is a significant split among the Circuit Courts as to the application of the deliberate indifference standard of analysis to condition of confinement claims by pretrial detainees, the petition for certiorari in this case should be denied. Sheriff Fletcher is entitled to judgment in his favor even if Butler's claims are viewed under the Fourteenth Amendment substantive due process clause.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution states that "[no] State [shall] deprive any person of life, liberty, or property without due process of law." "'The touchstone of due process is protection of the individual against arbitrary action of government.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). The substantive due process clause protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

Substantive due process violation occurs only when the official's behavior is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."

Lewis, supra, at 847, n.8. Negligence is insufficient to support a claim under the substantive due process clause of the Fourteenth Amendment. *Id.* at 849. Conduct that will most likely shock the contemporary conscience is government official's deliberate conduct that cannot be justified by any legitimate governmental interest. *Id.* (quoting *Daniels v. Williams, supra.*)

When determining whether a plaintiff stated a substantive due process violation, this Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. at 125 (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-226 (1985)). This Court further explained that in determining whether a substantive due process violation occurred, it is important to focus on specific allegations put forth in complaint to see how plaintiff "describes the constitutional right at stake and what the [sheriff] allegedly did to deprive [him] . . . of that right." *Id.*

Examination of Petitioner's complaint shows that he does not allege that any of his cellmates exhibited any of the physical symptoms of active (contagious) tuberculosis, such as persistent cough, weight loss, night sweats, or chronic tiredness; he does not allege that he himself exhibited any of those symptoms or that he asked for and/or was denied medical care.

Further, Petitioner failed to point to any conduct on the part of Sheriff Fletcher that deprived Petitioner of his constitutional rights. He points to no written policy or custom of Sheriff Fletcher not to screen detainees for tuberculosis. In fact, Sheriff Fletcher implemented written

policy requiring screening detainees for this disease. The Adult Detention Center (ADC) had a comprehensive process for the diagnosis and treatment of TB which by its terms and as implemented insured that pretrial detainees were NOT subjected to contact with inmates who had active, contagious cases of TB. The first step required an "Intake Interview" during which inmates are interviewed to determine "whether they have any infectious diseases or symptoms suggestive of tuberculosis including cough, weight loss, fever, night sweats or loss of appetite." If an inmate does present with any symptoms suggestive of TB, a chest x-ray is taken within 72 hours. The second step provided that a Mantoux[2] test be administered within fourteen days of an inmate's detention at the ADC, as required by Minn. Stat. §144.445, subd. 1. If the Mantoux test is positive, a chest x-ray is taken. If the x-ray suggests active TB, the inmate is transferred to a hospital and treated.

As required by Sheriff Fletcher's written policy and Minn. Stat. §144.445, subd. 1, Butler was given a Mantoux test on July 21, fourteen days after his initial detention at the ADC. His test was negative. In addition, no person with active, contagious tuberculosis was detained at the ADC at the same time as Butler. In fact, the ADC had no active case of tuberculosis since 1999.

As explained above, Sheriff Fletcher has promulgated, in accordance with Minnesota law, a written policy

---

[2] The Mantoux test is used to detect tuberculosis. A dose of tuberculin is injected into the skin on the forearm and the results are read 48 to 72 hours later. The person is considered to be positive for TB, if a palpable raised hardened area measuring 10mm develops at the injection site.

requiring screening and testing for tuberculosis. Petitioner's allegations failed under the Eighth Amendment standard adhered to by the Eighth Circuit Court of Appeals. Similarly, they fail under the Fourteenth Amendment substantive due process because Petitioner failed to show that any of Sheriff Fletcher's conduct was "so egregious [and] outrageous, that it may fairly be said to shock the contemporary conscience [of any court]." *Lewis, supra*, at 847, n.8.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

SUSAN E. GAERTNER
RAMSEY COUNTY ATTORNEY

DAVID F. MACMILLAN*
ANNA D. SCANLAN
50 West Kellogg Boulevard
Suite 560
St. Paul, MN 55102
(651) 266-3121

*Counsel of Record

Attorneys for Respondent

FILED
MAR 6 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-955

In The

Supreme Court of the United States

RONALD A. BUTLER,

Petitioner,

v.

ROBERT FLETCHER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SUSAN E. GAERTNER
RAMSEY COUNTY ATTORNEY

DAVID F. MACMILLAN*
ANNA D. SCANLAN
50 West Kellogg Boulevard
Suite 560
St. Paul, MN 55102
(651) 266-3121

*Counsel of Record

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Court has twice "reserved decision on the question whether something less than the Eighth Amendment's 'deliberate indifference' test may be applicable in claims by detainees asserting violation of their due process right to medical care while in custody," *City of Canton v. Harris*, 489 U.S. 378, 388 n.8 (1989), and the circuits are now divided five to five on the directly related question:

> Whether deliberate indifference is the degree of culpability that must be shown to establish that pretrial detention conditions amount to punishment in violation of the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

A. EVEN ASSUMING A DIVISION OF OPINION AMONG THE CIRCUIT COURTS ON THE QUESTION WHETHER THE CONSTITUTIONALITY OF PRETRIAL DETENTION CONDITIONS SHOULD BE ADDRESSED UNDER A FOURTEENTH AMENDMENT DUE PROCESS STANDARD OF *BELL* OR THE EIGHTH AMENDMENT DELIBERATE INDIFFERENCE STANDARD IN THE CONTEXT OF THE PROVISION OF MEDICAL CARE AND TREATMENT, THE EIGHTH AMENDMENT STANDARD IS APPROPRIATE 8

B. SHERIFF FLETCHER'S CONDUCT DID NOT VIOLATE BUTLER'S FOURTEENTH AMENDMENT RIGHTS 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Baker v. McCollan, 443 U.S. 137 (1979) 13

Bell v. Wolfish, 441 U.S. 520 (1979) 5, 7, 8, 9, 10, 11

City of Canton v. Harris, 489 U.S. 378 (1989) 11

City of Revere v. Mass. General Hospital, 463 U.S. 239 (1983) 11

Collins v. City of Harker Heights, Tex., 503 U.S. 115 (1992) 14, 15

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 14, 15, 17

Covino v. Vermont Department of Corrections, 933 F.2d 128 (2d Cir. 1991) 10

Crow v. Montgomery, 403 F.3d 598 (8th Cir. 2005) 5

Daniels v. Williams, 474 U.S. 327 (1986) 14, 15

Estelle v. Gumble, 429 U.S. 97 (1976) 13

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 9, 10

Lareau v. Manson, 651 F.2d 96 (2d Cir. 1981) 10, 11

Owens v. Scott County Jail, 328 F.3d 1026 (8th Cir. 2003) 5

Slade v. Hampton Regional Jail, 407 F.3d 243 (4th Cir. 2005) 10

Whitnack v. Douglas County, 16 F.3d 954 (8th Cir. 1994) 5

Wolff v. McDonnell, 418 U.S. 539 (1974) 14

Wolfish v. Levi, 439 F. Supp. 114 (SDNY 1997) 8, 9

Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978) 9

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. §1983 13

U.S. Const. amend. VIII ..... *passim*

U.S. Const. amend. XIV ..... *passim*

Minn. Stat. §144.445 16

RULES

Fed.R.Civ.P. 56 4

OTHER

Center for Disease Control, *Prevention and Control of Tuberculosis in Correctional Facilities: Recommendations from CDC,* 45 Morbidity & Mortality Wkly. Rep. (June 7, 1996), *available at* http://www.cdc.gov/mmwr/PDF/rr/rr4508.pdf 12

Federal Bureau of Prisons, *Preventative Health Care* (October 2005), *available at* http://www.bop.gov/news/PDFs/phc.pdf 12

STATEMENT OF THE CASE

Ronald Butler was a pretrial detainee confined in the Ramsey County Adult Detention Center (ADC) at various times between July 7, 2001, and October 31, 2001, when he was transferred to the custody of the Minnesota Commissioner of Corrections and transferred to the Minnesota Correctional Facility (MCF) in St. Cloud, Minnesota. While he was continuously in custody between July 7 and October 31, due to occasional overcrowding at the ADC during this period, he was from time to time transferred to other detention facilities. These included the Ramsey County workhouse, another Ramsey County detention facility but one not under control of Sheriff Fletcher, and a detention facility (jail) in an adjacent Minnesota county (Washington County). As a result of such transfers, Butler was actually physically present at the ADC only between August 16 and September 6, and between October 18, 2001, and October 31, 2001 (App. 5a). While at the ADC, Butler was confined to a two-person cell. While at the Washington County facility he was placed in a one-person cell.

In accordance with Minnesota Statutes Sec. 144.445, subd. 1, Butler was administered a Mantoux test for determination as to whether he had tuberculosis symptoms within fourteen days of his confinement. This test was administered while he was confined in the Ramsey County workhouse during one of his transfers, and the results were negative. Because of the negative results, he was not further tested during his stay at the ADC or the Washington County facility.

Upon his transfer to the MCF in St. Cloud, Butler was given another Mantoux test on or about November 1, 2001. This test was positive.

Robert Fletcher is the elected Ramsey County Sheriff and was so before, during, and after Butler's confinement. First elected Sheriff in November 1994, Sheriff Fletcher is charged with and responsible for administration of the ADC and promulgating all policies and procedures governing operation of the ADC and supervision and control of detainees and his staff of deputies and unsworn personnel.

In execution of his administrative responsibilities, Sheriff Fletcher promulgated a detailed Policy and Procedures Manual which governs the custody and treatment of persons detained at the ADC (App. 18a). This manual, and a tuberculosis treatment protocol promulgated by the ADC medical director, Dr. Neal Holtan, prescribe the following TB diagnosis and treatment procedures for detainees in the ADC (App. 18a and 19a):

1. Within twenty-four hours of incarceration, the detainee receives an initial screening, usually done by booking deputies, during which the detainee is asked if he or she has any infectious diseases (such as tuberculosis), or symptoms suggestive of tuberculosis, such as night sweats, cough, fever, weight loss, or loss of appetite, or any other infectious disease or health problems.

2. Within fourteen days of admission to the ADC, the detainee is administered a Mantoux test.

3. If the Mantoux test is positive, a chest x-ray is administered to the detainee as a further diagnostic tool.

4. If the chest x-ray suggests **active** tuberculosis, the detainee is transferred to a hospital for further testing, such as a sputum test, and treatment if an active case is diagnosed. A detainee with active TB is **not** returned to the general population of the ADC until no longer contagious.

A measure of the effectiveness of this protocol and policy is the fact that during Sheriff Fletcher's tenure there has been only **one** identified case of active TB and that was in 1999.

In his complaint, Butler claimed that he did not receive the initial screening but admits that he was administered the Mantoux test within fourteen days of his incarceration, with negative results. Butler did not claim in his complaint that he exhibited any symptoms of active TB, nor did he allege in his complaint that any of his cellmates exhibited any such symptoms, and did not allege that he was denied or otherwise received inadequate medical treatment while at the ADC.

In his *pro se* complaint, Butler attributes his contracting of TB, which resulted in the positive Mantoux test he received at the MCF St. Cloud, solely to the facts that he was incarcerated in two-person cells while at the ADC, and did not receive an initial screening for tuberculosis prior to the Mantoux test he did receive.

The lone causal connection between Sheriff Fletcher's actions and Butler's positive Mantoux test made by Butler in his complaint rests on an "inferences" he draws that because he did not receive an initial screening, the inmates who shared his cell must not have received a screening, and one (or more) of them must have had an

active TB case which infected him, which would not have occurred but for the double celling.

In late November 2004, Sheriff Fletcher moved the trial court for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

In his December 29, 2004, response to Sheriff Fletcher's motion, Butler **for the first and only time** made factual allegations and complained that sanitary conditions at the ADC were unsatisfactory to him; that as many as 26 detainees were placed in holding cells five or six feet wide and ten or twelve feet in length for up to eight or more hours at a time; that heating and air conditioning were cut off from time to time; that "correction officers" took delight in closing the food tray slot, thus cutting off ventilation; that only a single toilet in the holding cell was available; and, because of those conditions, it is little wonder that he contracted tuberculosis.

In support of these allegations in his response, Butler submitted an affidavit from another inmate at the MCF, Charles Burns, who had been a pretrial detainee at the ADC between October 26, 2001, and February 13, 2002. Mr. Burns' affidavit claimed that during his confinement at the ADC, his cellmate, Kor Vang, told him that he (Vang) had had a positive Mantoux test, a chest x-ray, and was required to take antibiotics thereafter. Burns' affidavit did not contain any averments that Kor Vang exhibited any of the symptoms of an active, contagious TB infection which would have required Vang's segregation from the ADC's general population. This affidavit of Burns, despite its questionable admissibility regarding Kor Vang's statements, shows that Sheriff Fletcher's TB protocol was, in fact, being followed. Pursuant to the protocol, Vang had

received a Mantoux test; when that test was positive he received a chest x-ray, and was required to take antibiotics thereafter. Far from providing evidence that Fletcher had violated Butler's rights and exposed him to TB, this affidavit shows that Sheriff Fletcher was sensitive to the medical risk of TB infection and implemented an appropriate diagnosis and treatment program which not only treated the person with TB, but also ensured that other detainees would not be exposed to an active, contagious case of the disease.

In his summary judgment motion, Fletcher sought judgment and dismissal of Butler's complaint on two grounds; first, that Butler's **factual** allegations, even if accepted as true, were insufficient for a jury to conclude that he had contracted TB while at the ADC and second, that even if he **had** contracted TB, his Eighth and Fourteenth Amendment rights were not violated by Sheriff Fletcher's policies or actions. Both Sheriff Fletcher and the District Court recognized that because Butler was a pretrial detainee, the standards enunciated by this court in *Bell v. Wolfish*, 441 U.S. 520 (1979), that the constitutionality of the treatment of a pretrial detainee was to be measured by Fourteenth Amendment due process, rather than the Eighth Amendment cruel and unusual punishment, standards (App. 6a, 7a). Under relevant Eighth Circuit precedents (see, *Crow v. Montgomery*, 403 F.3d 598, 601 (8th Cir. 2005); *Owens v. Scott County Jail*, 328 F.3d 1026, 1027 (8th Cir. 2003) (per curiam); *Whitnack v. Douglas County*, 16 F.3d 954, 957 (8th Cir. 1994) the district court held that the "deliberate indifference" analysis which had been applied to Eighth Amendment claims was also an appropriate analysis for Butler's Fourteenth Amendment claim. (App. 8a).

While acknowledging that Butler's factual allegations were "tenuous and speculative, and [Butler] most likely has not met his burden to set forth specific facts showing there is a genuine issue for trial" with respect to whether or not his TB was in fact contracted while at the ADC, (App. 9a), the District Court did not rule on this ground for Sheriff Fletcher's motion but granted Sheriff Fletcher's motion on the ground that there were no facts from which a jury could conclude that Sheriff Fletcher's policies caused a violation of either Butler's Eighth or Fourteenth Amendment rights, employing the "deliberate indifference" standard to analyze Sheriff Fletcher's conduct.

The Eighth Circuit, in its opinion, agreed and held that deliberate indifference was the appropriate standard of culpability for pretrial detainees (App. 22a). The Eighth Circuit did, however, expand the application of the "deliberate indifference" standard to evaluation of claims concerning not only the adequacy of medical care provided pretrial detainees, but also the food, clothing, and reasonable safety afforded pretrial detainees (App. 22a).

REASONS FOR DENYING THE WRIT

As a preliminary matter it is essential to recognize the narrow scope of Sheriff Fletcher's policies and conduct which underlie and form the basis of Butler's claims. While the Eighth Circuit applied its holding to a variety of conditions of confinement issues, such as whether the public officials have provided adequate food, clothing, shelter, medical care, and reasonable safety (App. 22a), Butler's real issue, as articulated in his complaint, is

solely grounded in Sheriff Fletcher's double-celling policy, and the alleged failure to screen detainees of the ADC for TB. He did not raise other issues in his complaint. It was not until his response to Sheriff Fletcher's summary judgment motion that Butler made any allegations of overcrowding and unsanitary conditions.

To the extent Butler bases his request for review by this Court on matters not raised in his complaint, this Court should deny his petition.

Butler asserts essentially two grounds for his petition in this matter. First, that there is a division among the Circuits whether the constitutionality of pretrial detention conditions should be addressed under the Fourteenth Amendment, due process standards articulated by the Court in *Bell v. Wolfish*, 441 U.S. 520 (1979) (Petition, p. 8), or Eighth Amendment deliberate indifference standards; and second, that the division presents an important issue as to whether the Eighth Amendment standard applicable to convicted prisoners should be applied to prevent "punishment" of pretrial detainees (Petition, p. 19).

Sheriff Fletcher requests that the Petition be denied on the following grounds: first, even assuming the split in the Circuits in connection with the Eighth Amendment versus Fourteenth Amendment analysis, as applied **in this case** to the narrow issue of the constitutionality of Sheriff Fletcher's actions with respect to medical care and double celling pretrial detainees, it cannot be held, in essence, that pretrial detainees are entitled to better medical care or more spacious cells than convicted prisoners; and second, there can be no doubt that the undisputed facts in this case show that Sheriff Fletcher's policies with

respect to medical care, and double celling did not violate either Butler's Eighth Amendment right to be free of cruel and unusual punishment **or** his Fourteenth Amendment due process rights.

A. EVEN ASSUMING A DIVISION OF OPINION AMONG THE CIRCUIT COURTS ON THE QUESTION WHETHER THE CONSTITUTIONALITY OF PRETRIAL DETENTION CONDITIONS SHOULD BE ADDRESSED UNDER A FOURTEENTH AMENDMENT DUE PROCESS STANDARD OF *BELL* OR THE EIGHTH AMENDMENT DELIBERATE INDIFFERENCE STANDARD IN THE CONTEXT OF THE PROVISION OF MEDICAL CARE AND TREATMENT, THE EIGHTH AMENDMENT STANDARD IS APPROPRIATE.

The plaintiffs in *Bell*, *supra*, consisted of both pretrial detainees and convicted prisoners who were confined at the Metropolitan Correctional Center (MCC), a federal correctional facility in New York City. *Wolfish v. Levi*, 439 F.Supp. 114, 119 (SDNY 1997). At the trial court, the plaintiffs, which included both pretrial detainees and convicted inmates, presented an impressively long list of complaints about their conditions of confinement, ranging from failure to classify inmates, which resulted in total confinement of detainees who were not dangerous, *id.* at 125, 126, overcrowding leading to double celling, *id.* at 134, to lack of conjugal visits. *Id.* at 142, 143. While the list of the plaintiff's grievances included a claim of inadequate medical care, the trial court concluded that the record with respect to this claim was incomplete, and declined to rule on this medical care claim. *Id.* at 165.

Both the trial court, *id.* at p. 124, and the Second Circuit Court of Appeals on review, *Wolfish v. Levi*, 573 F.2d 118, 124 (2d Cir. 1978) recognized that pretrial detainees had constitutional rights different from convicted prisoners and evaluated the various conditions of confinement claims for pretrial detainees in light of the standard that pretrial detainees could only be subjected to those privations which inhere in their confinement or **which are justified by compelling necessities of jail administration** (Emphasis added).

This court, in *Bell* at 532, rejected the Second Circuit's compelling necessity test, and held that under the Due Process clause the appropriate inquiry into the constitutionality of the conditions of confinement of pretrial detainees was whether such conditions amounted to punishment, *id.* at 535, because the Due Process clause prohibits **punishment** prior to adjudication of guilt.

In *Bell*, this Court held that the essential question was whether the disability imposed upon pretrial detainees constituted punishment at all. The Court noted that there is a distinction to be drawn between *punitive* measures, which may not be constitutionally imposed prior to a determination of guilt, and mere regulatory restraints which may legitimately be imposed by detention center officials. Citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the Court outlined a number of tests to employ when determining whether a particular restriction is punitive:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of **scienter**, whether its operation will promote the traditional aim of

> punishment, retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry. . . .

Id. at 168-169.

This Court, in *Bell* at 538-539, distilled the above holding into a formulation that courts must decide whether a disability is imposed for the purpose on punishment, or whether there was some other legitimate governmental purpose for the disability and that absent an express intent to punish on the part of detention facility officials, the determination would depend on whether an alternative purpose for the disability existed, and whether it appeared the disability was excessive in relation to the stated alternative purpose. The Court also noted that courts were to be mindful that this inquiry springs from constitutional requirements and judicial answers to the questions must reflect that fact rather than the court's idea of how best to operate a detention facility. *Id.* at 539.

This analysis works well when applied to many of the conditions of confinement of pretrial detainees. It is effective to determine actions and claims that officials have used excessive force in dealing with a pretrial detainee, whether the imposition of fees for services provided detainees is impermissible, *Slade v. Hampton Regional Jail*, 407 F.3d 243 (4th Cir. 2005), whether overcrowding is permissible, *Lareau v. Manson*, 651 F.2d 96 (2d Cir. 1981), whether transfers within a prison population is permissible, *Covino v. Vermont Department of Corrections*, 933 F.2d

128 (2d Cir. 1991) and other conditions which, as the court noted in *Slade, supra* at 251, can be characterized as a "disability". If a particular condition of confinement can be characterized as a disability, it takes no great leap of logic to at least begin the analysis of whether the disability can be found to be punishment, and thus, absent a reasonable relationship to a non-punitive governmental objective, precluded by the Fourteenth Amendment.

This analysis, however, breaks down when applied to medical care provided detainees.[1]

The difficulty is that providing a **benefit** to detainees, particularly medical care (which is in many cases better care than they receive when they are not detained in a correctional facility) simply does not constitute the traditional notion of a disability or punishment.

This court, post *Bell*, has twice implicitly acknowledged that medical care may not lend itself to a *Bell* Due Process analysis to the exclusion of the Eighth Amendment deliberate indifference standard. These cases, *City of Canton v. Harris*, 489 U.S. 378, 388, n.8 (1989), and *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243-45 (1983) reserved ruling on whether application of the deliberate indifference analysis to claims of inadequate medical care was appropriate in Fourteenth Amendment due process

[1] While complete failure to provide medical care to pretrial detainees arguably could be found a disability, *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981), the facts in this case are that Sheriff Fletcher had in place a very elaborate protocol and program to address the medical needs of detainees at the ADC, and hence cannot be found to have completely failed to provide medical care.

challenges to alleged inadequacies in the level of medical care by pretrial detainees.

The difficulty applying any standard other than deliberate indifference is clear and illustrated in this case by Butler's claim; any analysis of whether the medical care provided a pretrial detainee is "reasonably" related to a non-punitive governmental objective quickly turns into an analysis of the reasonableness of the medical care provided; and whether the existence of different opinions as to the adequacy of the care can be used to show that the governmental officials' actions were **not** reasonable.

This is precisely one of Butler's arguments before the Eighth Circuit. In his appeal, Butler cites standards for prevention of tuberculosis promulgated by the Center for Disease Control, *Prevention and Control of Tuberculosis in Correctional Facilities: Recommendations from CDC*, 45 Morbidity and Mortality Wkly. Rep. (June 7, 1996), *available at* http://www.cdc.gov/mmwr/PDF/rr/rr4508.pdf and the Federal Bureau of Prisons ("BOP") in Federal Bureau of Prisons, *Preventive Health Care* (October 2005), *available at* http://www.bop.gov/news/PDFs/phc.pdf, for the proposition that because these organizations provide different protocols for TB detection and treatment, a genuine issue for trial exists to determine whether Sheriff Fletcher's steps were reasonable and, hence, not punishment.

The difficulty with this, and any other, analysis which permits a complainant to argue that since there are other organizations or professionals who have different approaches to medical care, a triable fact issue as to the reasonableness of a public official's conduct is created. This, as the Eighth Circuit noted in its opinion is a **negligence** standard (App. 22a). It would, if adopted, convert

virtually every pretrial detainee's complaint of the medical care provided into, essentially, a medical malpractice action – a claim which this Court has emphatically stated is **not** a constitutional or other civil right subject to protection under 42 U.S.C. §1983. *Estelle v. Gumble*, 429 U.S. 97, 106 (1976); *Baker v. McCollan*, 443 U.S. 137, 146 (1979).

Given that this Court has held that claims of mere medical malpractice do not support a claim under 42 U.S.C. §1983, it follows that for this Court to find that the deliberate indifference analysis applied by the Eighth Circuit is not appropriate and that an analysis which evaluates the *reasonableness* of a public official's medical care policy and procedure is necessary, courts will have to fashion an analytical tool which is in the twilight zone between deliberate indifference and mere medical malpractice. That zone is too small and too fraught with the danger that every pretrial detainee's claims of inadequate medical care will virtually always create a triable fact issue.

Butler's application should be denied because the Eighth Circuit's reliance on the deliberate indifference standard is entirely appropriate in cases involving medical treatment of pretrial detainees. Application of the deliberate indifference standard avoids the medical malpractice issue without undermining the Fourteenth Amendment due process rights of pretrial detainees.

In addition, as the Eighth Circuit noted, application of the Eighth Amendment deliberate indifference standard insures that convicted prisoners will receive the same kind of medical care and treatment as pretrial detainees. Any other standard risks creation of a two-tiered system in

which pretrial detainees receive better medical care than convicted inmates – hardly a standard which comports with the notion that all persons confined by government have the same rights to basic human needs.

B. SHERIFF FLETCHER'S CONDUCT DID NOT VIOLATE BUTLER'S FOURTEENTH AMENDMENT RIGHTS.

Even if this Court finds that there is a significant split among the Circuit Courts as to the application of the deliberate indifference standard of analysis to condition of confinement claims by pretrial detainees, the petition for certiorari in this case should be denied. Sheriff Fletcher is entitled to judgment in his favor even if Butler's claims are viewed under the Fourteenth Amendment substantive due process clause.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution states that "[no] State [shall] deprive any person of life, liberty, or property without due process of law." "'The touchstone of due process is protection of the individual against arbitrary action of government.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). The substantive due process clause protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

Substantive due process violation occurs only when the official's behavior is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."

Lewis, supra, at 847, n.8. Negligence is insufficient to support a claim under the substantive due process clause of the Fourteenth Amendment. *Id.* at 849. Conduct that will most likely shock the contemporary conscience is government official's deliberate conduct that cannot be justified by any legitimate governmental interest. *Id.* (quoting *Daniels v. Williams, supra.*)

When determining whether a plaintiff stated a substantive due process violation, this Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. at 125 (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-226 (1985)). This Court further explained that in determining whether a substantive due process violation occurred, it is important to focus on specific allegations put forth in complaint to see how plaintiff "describes the constitutional right at stake and what the [sheriff] allegedly did to deprive [him] . . . of that right." *Id.*

Examination of Petitioner's complaint shows that he does not allege that any of his cellmates exhibited any of the physical symptoms of active (contagious) tuberculosis, such as persistent cough, weight loss, night sweats, or chronic tiredness; he does not allege that he himself exhibited any of those symptoms or that he asked for and/or was denied medical care.

Further, Petitioner failed to point to any conduct on the part of Sheriff Fletcher that deprived Petitioner of his constitutional rights. He points to no written policy or custom of Sheriff Fletcher not to screen detainees for tuberculosis. In fact, Sheriff Fletcher implemented written

policy requiring screening detainees for this disease. The Adult Detention Center (ADC) had a comprehensive process for the diagnosis and treatment of TB which by its terms and as implemented insured that pretrial detainees were NOT subjected to contact with inmates who had active, contagious cases of TB. The first step required an "Intake Interview" during which inmates are interviewed to determine "whether they have any infectious diseases or symptoms suggestive of tuberculosis including cough, weight loss, fever, night sweats or loss of appetite." If an inmate does present with any symptoms suggestive of TB, a chest x-ray is taken within 72 hours. The second step provided that a Mantoux[2] test be administered within fourteen days of an inmate's detention at the ADC, as required by Minn. Stat. §144.445, subd. 1. If the Mantoux test is positive, a chest x-ray is taken. If the x-ray suggests active TB, the inmate is transferred to a hospital and treated.

As required by Sheriff Fletcher's written policy and Minn. Stat. §144.445, subd. 1, Butler was given a Mantoux test on July 21, fourteen days after his initial detention at the ADC. His test was negative. In addition, no person with active, contagious tuberculosis was detained at the ADC at the same time as Butler. In fact, the ADC had no active case of tuberculosis since 1999.

As explained above, Sheriff Fletcher has promulgated, in accordance with Minnesota law, a written policy

---

[2] The Mantoux test is used to detect tuberculosis. A dose of tuberculin is injected into the skin on the forearm and the results are read 48 to 72 hours later. The person is considered to be positive for TB, if a palpable raised hardened area measuring 10mm develops at the injection site.

requiring screening and testing for tuberculosis. Petitioner's allegations failed under the Eighth Amendment standard adhered to by the Eighth Circuit Court of Appeals. Similarly, they fail under the Fourteenth Amendment substantive due process because Petitioner failed to show that any of Sheriff Fletcher's conduct was "so egregious [and] outrageous, that it may fairly be said to shock the contemporary conscience [of any court]." *Lewis, supra*, at 847, n.8.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

SUSAN E. GAERTNER
RAMSEY COUNTY ATTORNEY

DAVID F. MACMILLAN*
ANNA D. SCANLAN
50 West Kellogg Boulevard
Suite 560
St. Paul, MN 55102
(651) 266-3121

*Counsel of Record

Attorneys for Respondent